the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-11

ROOSEVELT F. PALMORE, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

ON APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

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Docket Entries

Superior Court of the District of Columbia
Criminal Division

Date	Entries	Judge
Feb. 23, 71	Indictment filed, assigned to Judge Korman, arraign. set Mar. 3, 1971.	
Mar. 3, 71	Defendant Informed of Complaint(s) and Right to Counsel. PLEA: Not Guilty. Continued to 3-31, Jury. Bond $2400.00. All pretrial motions to be filed not later than 3-18; response to be filed not later than 3-24. Hearing on pre-trial motions/ dispositions 3-30.	Judge Korman
Mar. 31, 71	Demand for jury trial withdrawn, plea of not guilty remains, trial by the court. Motions to dismiss indictment and to suppress evidence heard before trial. Motions denied. Stipulation as to substance of trial testimony filed herein. Judgment guilty. Continued to 4-27-71 at 10:00 o'clock a.m. for sentencing. Defendant referred to Probation Office for a presentence screening report. $2400.00 bond remains, defendant advised fully of penalties.	MDK
Apr. 27, 71	2-6 years. Defendant will serve 6 months. Execution of remainder sentence suspended. Probation—Six(6). Defendant committed w/o bond pending appeal. Committed.	MDK
May 4, 71	Notice of appeal filed.	DM

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on February 1, 1971

THE UNITED STATES OF AMERICA v. ROOSEVELT F. PALMORE	Criminal No. 9217-71 Violation: 22 D.C. Code 3204 (Carrying a Dangerous Weapon)

The Grand Jury charges:

On or about January 16, 1971, within the District of Columbia, Roosevelt F. Palmore did carry, openly and concealed on or about his person, and not in his dwelling house and not in his place of business and not on other land possessed by him, a dangerous weapon capable of being so concealed, that is, a pistol, without a license therefor issued as provided by law.

/s/ THOMAS A. FLANNERY
Attorney of the United States in and for the District of Columbia

A TRUE BILL:
/s/ LEONEL S. MOSLEY
Foreman.

[Caption Omitted]

INFORMATION OF PRIOR CONVICTION

Comes now the United States Attorney for the District of Columbia and informs the Court as follows:

1. The defendant, Roosevelt F. Palmore, has been indicted in the above captioned case, pending before this Court, on a charge of Carrying a Dangerous Weapon in violation of 22 D.C. Code § 3204;

2. That the said Roosevelt F. Palmore is the same Roosevelt F. Palmore who pleaded guilty on July 22, 1965, in the United States District Court for the District of Columbia to the offense of Attempted Robbery in violation of 22 D.C. Code § 2902 (Criminal No. 451-65);

3. That the offense of Carrying a Dangerous Weapon is punishable by imprisonment for not more than ten years when committed by a defendant who prior to his commission of that offense has been convicted of a felony in the District of Columbia (or in any other jurisdiction);

4. In consideration of the foregoing, the Court is advised that if the said defendant in the above captioned case is convicted of the offense of Carrying a Dangerous Weapon, he may be sentenced to imprisonment for a term as long as but not more than ten years.

[Signatures Omitted]

[Caption Omitted]

Motion to Dismiss Indictment

Defendant respectfully moves the Court for an order dismissing the indictment herein on the grounds that (1) this Court, not being a court ordained and established pursuant to Article III of the Constitution of the United States, lacks jurisdiction to exercise the judicial power of the United States in the hearing, trial and disposition of this case. * * *

In support of this motion, defendant respectfully refers the Court to his memorandum of points and authorities filed and served herewith.

Wherefore, this motion should be granted, and the Court should dismiss the indictment on the ground that it lacks jurisdiction. * * *

[Signatures Omitted]

[Caption Omitted]

MOTION TO SUPPRESS EVIDENCE

Pursuant to Rules 12(b)(3) and 41(g) of the Criminal Rules of this Court, defendant respectfully moves the Court for an order suppressing as evidence a pistol allegedly found by police officers in defendant's automobile on or about January 16, 1971, and any oral testimony relating or referring to said pistol from said police officers on the grounds that the circumstances under which the said pistol was allegedly found violated defendant's rights under the Fourth Amendment to the Constitution in that: (1) the stopping of defendant's automobile for the purpose of conducting a "routine spot check" constituted an arrest of defendant without probable cause in violation of the Fourth Amendment; (2) assuming *arguendo* that the initial stopping of defendant's automobile for the purpose of conducting a "routine spot check" constituted only a momentary detaining of the defendant, the police officers prolonged the detention beyond that necessary to ascertain that defendant possessed a valid operator's license, thereby converting the detention into an arrest of defendant without probable cause in violation of the Fourth Amendment; and (3) the pistol was allegedly discovered during an unlawful search of defendant's automobile, which search was not incident to a lawful arrest nor pursuant to a valid search warrant, in violation of defendant's right to be free from unreasonable searches and seizures as guaranteed to him by the Fourth Amendment.

In support of this motion, defendant respectfully refers the Court to his memorandum of points and authorities filed and served herewith. In further support of this motion, defendant requests an evidentiary hearing.

WHEREFORE, this motion should be granted, and an order should be entered suppressing as evidence a pistol allegedly taken from defendant's automobile on or about January 16, 1971, and any oral testimony relating or referring to said pistol from the arresting officers.

[Signature Omitted]

[Caption Omitted]

WAIVER OF TRIAL BY JURY

Defendant hereby waives trial by jury on the indictment herein.

/s/ Roosevelt F. Palmore
ROOSEVELT F. PALMORE
Defendant

/s/ Frank F. Flegal
FRANK F. FLEGAL
1819 H Street, N.W.
Washington, D.C. 20006
(293-6250)
Attorney for Defendant.

The United States consents to defendant's waiver of trial by jury.

/s/ Warren R. King
WARREN R. KING
Assistant United States Attorney

APPROVED:
/s/ MILTON D. KORMAN
Judge
March 30, 1971.

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Proceedings—March 31, 1972

[3] THE DEPUTY CLERK: Your Honor, the matter on the calendar this morning is the case of United States versus Roosevelt Palmore. Mr. Flegal. Mr. King for the government.

MR. FLEGAL: The defendant is ready, Your Honor.

MR. KING: The government is ready, Your Honor.

THE COURT: Are you Mr. Palmore?

MR. PALMORE: Yes, I am.

THE COURT: Will you look at this paper, please, sir, and tell me whether that's your signature on there?

MR. PALMORE: Yes.

THE COURT: Stand up, please, sir.

Do you know what that paper is, Mr. Palmore?

MR. PALMORE: Yes. It's a waiver of jury.

THE COURT: You understand, sir, that under the Constitution you have a right to a trial by a jury if you want one?

MR. PALMORE: Right.

THE COURT: By this paper you say that you want to give up that right, to waive your right to a jury trial. Is that what you want?

MR. PALMORE: Yes, sir.

THE COURT: You have discussed this with Mr. Flegal?

MR. PALMORE: Yes, I have.

THE COURT: And you understand fully what you are [4] doing, and what your rights are?

MR. PALMORE: Yes.

THE COURT: How old are you, sir?

MR. PALMORE: Thirty-four.

THE COURT: And how far did you go in school?

MR. PALMORE: To the tenth.

THE COURT: There is no question about your understanding of what you have done here?

MR. PALMORE: No, sir.

THE COURT: And this is what you want?

MR. PALMORE: Yes.

[Arguments on motion to dismiss indictment on Constitutional Article III issue were stenographically reported, but are not transcribed herein.]

THE COURT: Well, the fact that the Court of Appeals in affirming Judge Corcoran in *Bradford* against *Green*, to use the vernacular, ducked the issue, is not determinative of the proposition, because it is well known that all appellate courts will not decide a question on a constitutional ground if it can be avoided and disposed of otherwise, and I must say that the inclination of this Court is to do the same thing.

Now, I don't know that I can duck the issue, because you have presented it squarely, and while I am not bound by what Judge Corcoran has decided, his is the only decision that touches directly on the very issue that you have raised, and [5] it is rather persuasive.

I would like to call counsel's attention to another case, and it goes back in my time—it is possibly too old for either counsel before me to have read—but it was decided in January of 1940, and it is entitled *Neild* against *The District of Columbia*. Now, this was not a case challenging the jurisdiction of the Court, but actually was a tax case challenging a tax which had then been enacted by the Congress for the District of Columbia, and it was a gross receipts tax, and because some of the receipts were from interstate commerce, the law was attacked on that ground as being outside the jurisdiction of Congress to enact.

Now, I acknowledge that the situation is not the same, but some of the language in this case, which was written by Associate Justice Miller of the United States Court of Appeals, and that my recollection is, is Justin Miller, who is no longer on the Court, and who was a very splendid judge, and concurring with him was Chief Justice Groner—they had the titles of justices in those days—Justice Stevens, who later became chief justice of that court, Justice Edgerton, who recently passed away, and Justice Vinson, who later on went to the Supreme Court of the United States, and became Chief Justice of the United States. I read you from Page 309 of 71 Appeals, D.C., the case commencing on Page 306. It is also found in 110 F.2d at Page 246 apparently.

[6] "Power to legislate for the District of Columbia is expressly delegated by the Constitution. Article I, Section 8, Clause 17, gives to Congress power to exercise exclusive legislation in all cases whatsoever over such District, not exceeding ten miles square, as may, by Cession of partic-

lar States and the acceptance of Congress, become the seat of the government of the United States."

They have italicized the words exclusive legislation in all cases whatsoever.

"That delegation is sweeping and inclusive in character, to the end that Congress may legislate within the District for every proper purpose of government. Within the District of Columbia there is no division of legislative powers such as exists between the federal and state governments. Instead there is a consolidation thereof, which includes within its breadth all proper powers of legislation. Subject only to those prohibitions of the Constitution which act directly or by implication upon the federal government,"—I don't think that applies here—"Congress possesses full and unlimited jurisdiction to provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end. In fact,"—and this is important—"In fact, when it legislates for the District, Congress acts as a legislature of national character, exercising complete legislative control [7] as contrasted with the limited power of a state legislature on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other."

Now, in a footnote we find these citations and statements, among others. A citation to *Wight* against *Davidson* at 181 U.S. at Page 371, holding the Fourteenth Amendment inapplicable to the District of Columbia. On the other hand, the rights and liberties protected by the Bill of Rights in Amendments One to Eight against encroachment by the national government has been held applicable to the District, although not to the states, thus the provisions of the Fourth Amendment are not applicable to the states, and they cite cases. The Fifth Amendment requires that a person in the District shall not be tried for the commission of a crime unless on presentment or indictment by a grand jury—they cite a case—whereas so far as the states are concerned this may be dispensed with—and they cite cases. Double jeopardy is prohibited in cases of crimes committed in the District—and then they cite a case—but a like prohibition does not apply to state action—and citing *Caline* against *Wilson* in 127 U.S.—it was held that under the Sixth Amendment one charged with a crime in the District

is entitled to a jury trial, although the right to such trials may be abolished by the states. Likewise the right to trial by jury is in common law actions as provided by the Seventh Amendment is a limitation upon the District, but not [8] upon the states.

So that they point out that there are many differences between the approach, both civil and criminal law, in the District of Columbia vis-a-vis the states. Congress is the legislature for the District of Columbia, and under this broad language, as well as some of the citations by Judge Corcoran, and the other rationale, it seems to me that Congress can, when they legislate for the District of Columbia, and this statute under which this indictment is laid is a statute for the District of Columbia, can set up a court system here to enforce that law which is passed for the District of Columbia. This is not a court which tries acts of Congress which are applicable nationally; it is a court which is set up by Congress to enforce the laws which Congress enacts for the District of Columbia, and the fact that this man may be tried in an Article I court here, and might, if he violated a national law, be triable only in an Article III court elsewhere than in the District of Columbia, to me is not a basis for striking down the jurisdiction of this court. Congress has retained in the District the United States District Court—not only now, but later—and those acts which are applicable nationally, which are violations of act of Congress nationally applicable are tried there in the United States District Court, and not here, so that they have made a distinction. Having in mind what I read to you here from the *Neild* case, and the reasoning [9] of Judge Corcoran in the *Bradford* versus *Green* case, I find difficulty in buying your argument, Mr. Flegal. I am persuaded that the Congress has the right, aside from what Judge Corcoran said, on the basis of what I read to you here from *Neild*, plus what Judge Corcoran says, a right to set up this court, be it an Article I court, to try those who violate the laws which Congress has enacted for the District of Columbia. The Congress sits, when it enacts for the District of Columbia, in both capacities, says *Neild* —as a local and a national legislature, and as such I don't see any basis for the contention that this man cannot be tried perfectly legally and constitutionally in this court in

violation of this act enacted by Congress for the District of Columbia.

I will deny your motion on that basis.

• • •

[10] MR. FLEGAL: Your Honor, the third motion before Your Honor—the third motion, the second issue before Your Honor this morning is the defendant's motion to suppress evidence.

Both parties have filed memoranda, and I move for an evidentiary hearing as necessary to Your Honor's disposition of this motion.

[11] THE COURT: All right, sir. You may put on whatever you want in that regard.

MR. FLEGAL: Fine, Your Honor.

May I also ask for the invocation of the rule on witnesses on this motion? I notice some witnesses from both sides are in the courtroom.

THE COURT: Yes. All witnesses on both sides will retire to the witness room until called, for the government and for the defense.

MR. FLEGAL: On the hearing on the motion to suppress, Your Honor, the defendant will take the stand as the defense's first witness.

[The testimony of Mr. Roosevelt Palmore was stenographically reported, but is not transcribed herein.]

MR. FLEGAL: The defendant calls Lillian Payne to the stand, Your Honor.

[The testimony of Miss Lillian Payne was stenographically reported, but is not transcribed herein.]

MR. FLEGAL: Your Honor, the defendant will rest.

THE COURT: Does the government offer any evidence?

MR. KING: Yes, Your Honor. I am going to call Officer Paul Busker.

OFFICER PAUL K. BUSKER,

having been called as a witness on behalf of the government, and having been previously duly sworn, was examined and testi- [12] fied as follows:

DIRECT EXAMINATION

By MR. KING:

Q. Officer, please, in a loud, clear voice, state your full name, and duty assignment.

A. Officer Paul K. Busker, Metropolitan Police Department.

THE COURT: [Spelling] B-u-s-t-e-r?

THE WITNESS: [Spelling] B-u-s-k-e-r. Metropolitan Police Department, assigned to the Fourth District investigators.

By MR. KING:

Q. Now, Officer Busker, directing your attention to the 16th of January, of this year, what was your duty assignment?

A. Special Operations Division.

Q. Were you on duty that day?

A. Yes, I was.

Q. Directing your attention to about 8:00 p.m., did you have occasion to make an arrest?

A. Yes, I did.

Q. Were you—would you describe the type of automobile that you were in, and how you were dressed?

A. Yes. I was dressed in casual clothes, street clothes, and I was driving an unmarked police cruiser.

Q. Now, did you have a partner?

[13] A. Yes, I did.

Q. Who was your partner?

A. Officer Morrissette.

Q. Now, you said that you did—had occasion to make an arrest on that date at about 8:00 p.m. Would you relate to His Honor, please, the circumstances that led up to that arrest?

A. Yes. We observed a vehicle with Virginia rental tags—I believe they were 87311—on Florida Avenue, Northwest. We stopped the vehicle.

Q. Now, you said at Florida Avenue, Northwest. Where on Florida Avenue?

A. This was—we first saw the—we first saw the vehicle in the 600 block of T Street, Northwest, and then the vehicle went east on T, and made a left, and then went out west on Florida Avenue.

THE COURT: That's almost a U-turn, isn't it?

THE WITNESS: Yes, sir. There is a—there is—T Street

intersects with Florida. There is a drive like, or an island like where you can make a left turn and go back west on Florida Avenue.

THE COURT: Well, T Street and Florida Avenue almost run parallel, or at least T Street runs due east and west, and Florida Avenue runs southeast, northwest. They come to a point there, do they not?

[14] THE WITNESS: Yes, sir, They intersect right in the 900 block of ——

THE COURT: The point I'm making is that to go west on Florida Avenue from T Street—from east on T Street, you practically make a U-turn, do you not?

THE WITNESS: Yes, Your Honor.

THE COURT: All right.

By MR. KING:

Q. Now, Officer, you stated that this was a Virginia rental car?

A. Yes, it was.

Q. Would you explain how you knew it was a Virginia rental car?

A. Because of the Virginia rental tags are—the tag number was 87311. Virginia rental tags are all in that—not in that series—they start at 70000, and then there is a dash, and they have three numbers, and they go up and include 99000, dash, and three numbers.

Q. How do they differ from other Virginia tags?

A. The regular Virginia tags are proceeded by the letter A, and then have six numbers, or they just have six numbers.

Q. A, and six numbers, or six numbers?

A. Yes.

Q. Is it possible for a car to have five digits and not be a rental car?

[15] A. Yes, it is.

Q. Would you explain how that is?

A. This would just be lower tag numbers that are not included in the 70000 up to 99000 series, but——

Q. Well, then would a license tag 43-299, would that be a rental car?

A. No, it would not.

Q. Now, you said the automobile turned onto Florida Avenue. And what did you do?

A. We fell in behind the car at this time.

Q. And did you have cause ultimately to stop that car?

A. Yes, we did.

Q. And where did you stop the car?

A. We stopped the car on Florida and Vermont, Northwest.

Q. Now, who was driving that car?

A. Mr. Palmore.

Q. Would you describe what he's wearing, please?

A. Yes. He's sitting to my right. Has a grey suit, and a blue shirt.

Q. Now, you say the car stopped at Florida and Vermont?

A. Yes, sir.

Q. Now, does Florida and U Street merge in any way at that point?

A. Yes. I believe on the other side of Vermont it's U Street, and on the east side of Vermont I think it's still [16] Florida.

Q. Now, where exactly did the car stop?

A. Right at the intersection of Vermont and Florida Avenue. That would be on the east side of Vermont.

Q. Now, where did Mr. Palmore's car stop with respect to your own car?

A. In front of us.

Q. Now, when the car stopped, would you explain please first what Mr. Palmore did?

A. The car stopped, and Mr. Palmore got out of his car.

Q. And when he got out of his car, where, if anywhere, did he go?

A. He started walking back towards our car.

Q. Now, when the car stopped shortly after, what did you do?

A. I immediately got out of my car, and started walking toward his car.

Q. And did there come a time when you and Mr. Palmore stopped?

A. Yes.

Q. And where?

THE COURT: By the way, who was driving the car you were in?

THE WITNESS: I was.

By Mr. King:

[17] Q. About where, with respect to Mr. Palmore's car, did this take place?

A. We met roughly in the area of the rear—left rear door of his car.

Q. Now, Officer Busker, I want you to explain what your partner, Officer Morrissette did upon the stopping of your car?

A. Officer Morrissette got out of the car—our car at the same time I did, and he walked from our car up to the right front door of Mr. Palmore's car.

Q. How was Officer Morrissette dressed?

A. He was dressed in the same attire I was.

Q. Did you observe what, if anything, Officer Morrissette did, or was doing, after he arrived at the right-hand side of the car?

A. No, I could not see what he was doing at that time.

Q. What equipment, if any, did Officer Morrissette have with him?

A. He had a flashlight with him.

Q. Now, would you explain, please, to His Honor, the result of your meeting Mr. Palmore next to his car, and any discussions that you might have had with him?

A. Yes. I asked Mr. Palmore for his driver's license, his permit, and the rental agreement to the vehicle.

Q. And did he produce the driver's license?

A. Yes, he did.

[18] Q. And did he—where was the driver's license? Was it on his person at that time?

A. Yes, it was.

Q. Did he produce that to you at that point?

A. Yes, he did.

Q. You also asked him for the rental agreement; is that correct?

A. Yes, sir.

Q. Did you specify rental agreement?

A. Yes, I did.

Q. And did he comply with your request?

A. He did not have—not at that time, no.

Q. Well, what did he do in response to your request?

A. He went back to the vehicle to get the rental agreement out of the glove compartment.

Q. And did he then give you the rental agreement?

A. Yes, he did.

Q. Do you recall looking at that rental agreement?

A. Yes, I do.

Q. Do you know from the rental agreement, or can you recall from the rental agreement the corporation or the company from which he had rented the car?

A. Yes. It was Avis Rental Company.

Q. Do you recall from your viewing the contract when the car had been rented?

[19] Mr. Flegal: Objection, Your Honor. The document itself is the best evidence of that, and I would like some *voir dire* on this as to what happened to that document.

The Court: All right.

By Mr. Flegal:

Q. Officer Busker, did the defendant give you a copy of his rental agreement?

A. Yes, he did.

Q. And did you keep that copy?

A. Until we got into the station, yes.

Q. And then what did you do with it, sir?

A. I turned it over to somebody that came from Avis to pick up the car.

The Court: You turned it over to whom?

The Witness: Somebody that came from Avis. We called Avis, and told them that we had the car. They came to 3-D-1 and picked the car up, and I gave them the agreement.

Mr. Flegal: Your Honor, I object to the testimony. The document itself is the best evidence of what's in the agreement. He had it, and gave it back.

The Court: Well, if the agreement's existence and location has been accounted for, secondary evidence, it seems to me, may be introduced as to its contents. The primary evidence is proper to be introduced if it's available, but it's not.

[20] Mr. Flegal: May I continue the *voir dire* for just a minute?

The Court: Sir?

Mr. Flegal: May I just ask one or two more questions?

Mr. King: Your Honor, before he does that might I address myself to this. The purpose of this line of inquiry is to determine what the officer's reaction was and what he

determined from looking at the rental agreement. I'm not offering the rental agreement as proof that the car was overdue; I am only inquiring as to the rental agreement so that we can determine what the officer ——

THE COURT: I assume, without knowing definitely, that what we're about to get into is the question of what the officer did thereafter, and whether or not it was reasonable, and for these purposes hearsay is admissible, even if it wasn't true, if the officer saw something and believed it. I mean we're in the same situation as if an officer made an arrest for believing that a felony had been committed on the report to him of another person that a felony had been committed. Even if the person had given him false information, if the officer heard it, and believed it he may testify to that as explanatory of his actions. On that basis I will let him testify.

MR. KING: Thank you, Your Honor.

By MR. KING:

[21] Q. Officer, I show you what has been marked as Government's Exhibit 1 for identification, and ask you whether that is familiar to you?

A. Yes, it is.

Q. How is it familiar to you?

A. This is a rental agreement from Avis, given to customers that rent cars from Avis.

Q. Now, is that the same piece of paper that Mr. Palmore gave you?

A. Yes, I believe it is. Maybe. The other one might have been pink—the copy I got.

Q. So, it's not the exact same piece of paper that he gave you?

A. It might not be.

Q. But is that a copy, as best you can determine, of the piece of paper that Mr. Palmore gave you?

A. Yes, it is.

Q. And does that piece of paper indicate the expiration date of the rental agreement with Mr. Palmore?

A. Yes, it does.

Q. And what is that date?

A. January 12th.

Q. Now, the piece of paper that you saw, I believe you said it was pink, did it, as far as you can recall, in any way

reflect a date other than January 12th as the termination [22] date for the rental agreement?

A. No, sir; it did not.

Q. Thank you, Officer. Now, I believe you testified that Officer Morrissette was on the other side of the car at this time while you were looking at the rental agreement; is that correct?

A. Yes, he was.

Q. Now, would you relate to what occurred subsequent to Mr. Palmore presenting you with the rental agreement?

A. Yes. As I was talking to Mr. Palmore about the rental agreement, Officer Morrissette stated to me from the other side of the car where he was that there was a gun in the car.

Q. And what, if anything, did he do then?

A. Officer Morrissette then came around from the passenger's side, around the front of the car to the driver's side, and lifted up the armrest, and pulled out the gun.

Q. Did he get into the car when he—to recover the gun?

A. Pardon me?

Q. Did he get into the car to recover the gun?

A. Yes, as far as he had to go. Over to the armrest.

Q. But when he exited from the car, he had a gun in his hand?

A. Yes, he did.

Q. Thank you. I have nothing further, Your Honor.

[23]

CROSS-EXAMINATION

By Mr. FLEGAL:

Q. Officer Busker, why did you stop the defendant's car?

A. For a spot check, and also the Virginia rental tags, we come across a lot that are rented and not taken back on the proper date.

Q. For both of those reasons?

A. Yes.

Q. What is a spot check, Officer?

A. A spot check is to determine if a driver has the proper license, (and registration, or rental agreement).

Q. Had you ever received instructions from the police department on spot checks, either written, or oral?

A. Just to make them.

Q. Who gave you those instructions, sir?

A. The commanding officer of S.O.D., our lieutenant, and our sergeants.

Q. All right. S.O.D. is Special Operations Division?

A. Yes, it is.

Q. And when did your commanding officer of S.O.D. give you such instructions, Officer?

A. I don't recall when.

Q. More than once?

A. Yes.

Q. What instructions did he give you?

[24] A. I believe they were to make traffic stops?

Q. How many?

A. No set amount.

Q. Did he give you any basis, any instructions, as to who you selected to stop for a traffic stop?

A. No, sir.

Q. How do you select, Officer?

A. I believe this is left up to each individual officer.

Q. Right. I understand. How do you select?

A. How do I select?

Q. Yes.

A. On a given time it varies. I don't select anyone on any certain basis.

Q. How many spot checks do you make in an average—what do you have, an eight-hour shift of duty?

A. Yes.

Q. On an average eight-hour shift of duty?

A. I have no idea. This depends on the area I'm working, the day of the week, the tour. I have no idea.

Q. How long had you been out in the Vermont and Florida area around January 16th? Had you been there more than one day?

A. I don't understand the question.

Q. How long had you been assigned to the area that you were in the day this happened?

A. I don't know, because we were working old clothes, and [25] they just assigned us to the district, I believe.

Q. Anywhere in the district?

A. Yes.

Q. How many spot checks—how long had you been assigned in old clothes?

A. I was—went into old clothes in November, of 70.

Q. So, at the time this happened, roughly two months of old clothes duty?

A. Yes.

Q. How many spot checks had you made during that time?

A. I have no idea.

Q. How many spot checks did you make on the night that this incident took place?

A. I have no idea.

Q. More than one?

A. I believe so, yes.

Q. How long had you been on duty that night?

A. I believe we were working 2:00 to 10:00, so I came on at 2:00 in the afternoon.

Q. Been on about six hours when this happened?

A. Yes.

Q. Do you keep a list of the spot checks you make?

A. No, I don't.

Q. What was the traffic condition when you first observed the defendant's car?

[26] A. When I first observed it?

Q. Yes.

A. Nothing. No traffic at all.

Q. No traffic at all. He was the only car on the road?

A. On T Street, yes.

Q. What—were you driving, or stopped when you first saw his car?

A. I was parked.

Q. Were you the only police car parked there, or was there another police car parked with you?

A. I believe there was another car parked on T Street.

Q. When did you decide to make a spot check of Mr. Palmore's car?

A. When I first saw the car go by.

Q. And how far did the car go before you pulled it to the—how did you pull it to the side of the street? With your red lights?

A. The red lights on an unmarked cruiser are in the grill, so yes I did activate the red light.

Q. How far did the car go before you activated the red light from the time you first saw him?

A. I believe when it made the left off T onto Florida, across Georgia Avenue, and I think as quick as I got across Georgia Avenue, if I recall, I turned on the red lights.

Q. So that is—am I correct, that's a block, plus a [27] turn?

A. Yes.

Q. And how far did the car go before it stopped?

A. From Georgia to Vermont.

Q. Half, three-quarters of a block? Something like that?

THE COURT: That's about two blocks, three blocks.

MR. FLEGAL: Two blocks.

By MR. FLEGAL:

Q. Did you ever receive any instructions from S.O.D. or anyone else, Officer, concerning rental car inspections?

A. How do you mean?

Q. I understood you had two grounds for this stop; a spot check for operator's permit, and because it was a rental car?

A. Right.

Q. Did you ever receive any instructions on stopping and inspecting rental cars?

A. No, not rental cars per se. No.

Q. Why do you stop and inspect rental cars?

A. Why do I stop them?

Q. Yes.

A. Because, like I stated before, a lot of these cars are rented, and are not taken back on time, and on other occasions I have personally known where an officer stopped a rental car and got about $6,000 worth of dope out of the car.

[28] THE COURT: Six thousand dollars worth of dope?

THE WITNESS: Yes, sir.

By MR. FLEGAL:

Q. Do you stop rental cars because you might get $6,000 worth of dope out of the car, Officer?

A. No, I do not.

Q. How do you know that rental cars are often overdue in their agreements?

A. From past experience of stopping rental cars.

Q. How long have you been stopping rental cars, Officer?

A. For over a year. I don't ——

Q. How long had Officer Morrissette been assigned with you?

A. I—he wasn't my regular partner, so I don't know. He was assigned with me that night.

Q. Had he been with you a few days before, or was that his first night with you?

A. No. I think we had worked together before, but I don't recall when.

Q. Officer, when you proceeded to make the spot check of the defendant's car, when you proceeded to stop the defendant's car, did the other police car that was parked with you follow you?

A. Yes. I believe they did. Yes.

Q. Do you know who was in that car?

[29] A. Yes, I do.

Q. Who was it, sir?

A. Officer Shaefer, and Officer Campbell.

Q. Of the Metropolitan Police Department?

A. Yes.

Q. When the car first stopped, Officer Busker, and the defendant approached you, did you say anything to him?

A. I asked for his permit and the rental agreement.

Q. And what did he say to you, if anything?

A. I don't recall if he said anything or not.

Q. All right. There came a time, did there not, when he returned to the car to get a rental agreement out of the glove compartment as you testified?

A. Yes, he did.

Q. When he returned to you with that agreement—let me back up a moment. Did you follow the defendant when he went to get that rental agreement, or did you remain stationary?

A. No. I followed him up to the open door.

Q. When he returned from the car with the rental agreement, where were you and he standing, sir, when you were looking at him?

A. Probably—I believe we were right by what would be the post of the—in a sedan car. The post coming down.

Q. By the driver's door?

A. In the rear of the driver's door, yes.

[30] Q. Do you recall, Officer, whether the front door remained open or closed after he came back with the rental agreement?

A. I don't—I believe it was open. I'm not sure.

Q. After he showed you the rental agreement, did you say anything to him?

A. Yes, I did.

Q. What did you say, sir?

A. I asked him about the car being overdue.

Q. How long did that conversation take place, Officer? How long a period of time did it take place?

A. A minute or two.

Q. And during this period of time, do you know what Officer Morrissette was doing?

A. I know he was on the other side of the car. I don't know what he was doing. I couldn't see him.

Q. Did you ever see Officer Morrissette before he said he—there is a gun in the car?

A. Yes.

Q. Did you ever see Officer Morrissette on the driver's side of the car?

A. Not until after he had said there was a gun in the car, no.

Q. Did you ever see Officer Morrissette before he said there was a gun in the car, open the trunk?

[31] A. No.

Q. Did Officer Morrissette ever open the trunk of that car?

A. Not to my knowledge.

Q. That you saw?

A. Not to my knowledge.

Q. Officer, I show you Government's Exhibit 1 for identification, the rental agreement, and I ask you if you see anything on that agreement that was not there when you looked at the defendant's copy of that agreement, other than, of course, the identification sticker?

A. If I see anything that was not there?

Q. Yes, sir.

A. I don't believe this red line up here was there.

Q. Referring to a red line at the upper right-hand corner?

A. Right.

Q. Anything else, sir?

A. I don't believe where it says car picked up by fleet control was there.

Q. All right. Also in the upper right-hand corner.

A. And I don't believe this January 21st was stamped on there.

Q. Okay. Sort of the middle lower left-hand corner?

A. Yes.

[32] Q. Anything else?

A. I don't know if there's anything else or not. I don't know.

Q. Do you recall the mileage being on there, Officer?

A. There is mileage on there; yes, sir.

Q. Do you recall it being there when you looked at the defendant's copy?

A. Just as a matter that I know that it's on every contract. That's the only way.

Q. Do you know about the figures, Officer, the computation of the rental charges were not on there when you looked at the defendant's copy, if you know?

A. I don't know if they were on there, or not.

Q. Okay. Thank you, sir.

[A pause.]

THE COURT: Anything further, Mr. Flegal?

MR. FLEGAL: I beg your pardon?

THE COURT: Anything further?

MR. FLEGAL: Oh, yes. Excuse me. I was just getting some notes.

THE COURT: We are past the normal recess time. Will you be very long with this witness?

MR. FLEGAL: I'm afraid I may be another ten or fifteen minutes, Your Honor.

THE COURT: All right. We'll recess for lunch until [33] 1:45.

MR. FLEGAL: Your Honor, excuse me. Before recess, Your Honor, may be have a similar instruction on witnesses?

THE COURT: Yes.

Mr. Busker, do not discuss this matter with Officer Morrissette during the luncheon break.

THE WITNESS: Yes, sir.

THE COURT: If you talk with him at lunch time. I'm not saying you shan't have lunch together if you want to, but

you must not tell him anything about any details of what was testified to by you.

[Court was recessed at approximately 12:40 p.m.]

AFTERNOON SESSION

[Court was reconvened at approximately 1:45 p.m.]

THE COURT: You may proceed, sir.

THE DEPUTY CLERK: You remain under oath, Officer.

By MR. FLEGAL:

Q. Officer Busker, when you have occasion to make a spot check on an out of state vehicle that is not a rental vehicle, what are you looking for?

A. Driver's license, and registration.

Q. And why are you looking for registration of an out of state vehicle, sir?

A. To show ownership of the car.

Q. And why are you looking for ownership of the car, sir?

[34] A. So the man driving can prove that it's his car.

Q. Do you make any distinction, Officer, between a spot check, and a traffic check?

A. Do I?

Q. Uh huh.

A. No, sir; I don't.

Q. They are the same thing, as far as you are concerned?

A. Yes.

Q. And with rental vehicles, instead of a traffic—or instead of a registration permit, what are you looking for?

A. A rental agreement.

Q. Why are you looking for that, sir?

A. To show that the driver has got the rental agreement, because they don't issue registrations.

Q. Why are you looking to see why the driver has a rental agreement?

A. To make sure that the car is not overdue.

Q. And why are you looking to make sure that it's not overdue, sir?

A. Because it's supposed to be due back at a certain time, and it should be back at that time.

Q. And why are you concerned with whether or not the rental car is returned, sir?

A. Because it's—it's a criminal charge if it's not.

Q. Fine. Thank you. And the basis, as I understood your [35] testimony this morning, Officer, for stopping the defendant's car was both a spot check, or a traffic check, and for a rental agreement check?

A. That's correct. Yes.

Q. Do you recall giving testimony at a preliminary hearing before Judge Bacon, sir?

A. Yes, sir.

Q. Do you recall being asked why you stopped the defendant's car at that hearing?

A. I believe I said for the same reason, spot check or traffic check.

Q. Right. Do you recall mentioning to Judge Bacon a rental agreement check?

A. I don't know if I did, or not. I don't believe so. I don't know.

Q. Do you know, sir?

A. I don't know if I did, or not. No.

Q. Let me show you Page Number 9 of the transcript of that preliminary hearing, Officer, and ask you if that refreshes your recollection?

And does it refresh your recollection, sir?

A. Yes.

Q. And what was your answer that you gave Judge Bacon?

A. I believe the question was why I stopped him. I said for a spot check.

[36] Q. Fine. After the preliminary hearing, Officer, did you have occasion to talk with anyone concerning the incident surrounding this arrest for purposes of your testimony?

A. I don't believe I did.

Q. Did you talk to the U. S. Attorney?

A. Not about my testimony, no.

Q. Did he ask you what happened that night?

THE COURT: At what point are you asking about?

MR. FLEGAL: At any point subsequent to the preliminary hearing with Judge Bacon.

THE COURT: Subsequent to the preliminary hearing.

THE WITNESS: I don't recall.

By MR. FLEGAL:

Q. How about Officer Morrissette? At any time after the preliminary hearing have you discussed the incident with him?

A. Not to my knowledge. I don't know.

Q. You don't remember?

A. No.

Q. Officer, do you know where the gun was found inside the car?

A. Only from what Officer Morrissette told me, yes.

Q. Do you know how far the gun was from the defendant when it was found?

A. From what Officer Morrissette said I can take a [37] guess, yes.

Q. What would that guess be, sir?

A. It would be the distance from the armrest, which was down in the middle of the seat, to the rear of the front door where Mr. Palmore and I were standing.

Q. And what would that be, sir?

A. It would probably be two or three feet.

Q. Do you remember being asked that question at the preliminary hearing, Officer?

A. No, I don't.

Q. Let me show you Page Number 6 of your preliminary hearing transcript, and ask you if that refreshes your recollection, sir?

A. Yes.

Q. And what is your recollection, sir?

A. That a question there was how far the defendant was from the gun when I seized him. I believe that was the question. I said six inches to a foot.

Q. The question is approximately how far would you say his weapon was located when you seized him, and you said six inches to a foot?

A. Yes.

Q. And to what did you have reference at that time, sir?

A. I don't recall. I don't know what I was referring to.

Q. Did you look at the armrest of this car, Officer, [38] yourself? Did you see it?

A. Yes, I did.

Q. Can you estimate for His Honor approximately how wide the armrest is?

A. I believe it's probably six to eight inches wide.

Q. And was it in the down position, or in the up back-in-the-seat position when you saw it, sir?

A. When I first saw it, I believe it was down.

Q. Uh huh.

A. When I first saw it, it was down.

Q. And when did you see it later?

A. Yes, I did.

Q. And what position was it in then?

A. Up.

Q. Do you know how it got up?

A. I believe Officer Morrissette pushed it up.

Q. Do you know when he did?

A. I assume after he got the gun. I don't know.

Q. After the defendant had shown you his driver's license, Officer, and went back into the car to get his rental agreement, as I understood it, at that point had Officer Morrissette said to you, "I see a gun"?

A. No, I don't believe it was. No.

Q. All right. At that point was the defendant free to go as far as you were concerned? If he would have stated, "I [39] don't want to show you my rental agreement," and got in the car to drive off, would you have let him?

A. No.

Q. Did you ever hear Officer Busker say to you, "I told you a rental car was a good case, or a good bust"?

A. I am Officer Busker.

Q. I'm sorry. Officer Morrissette. Did Officer Morrissette ever say to you, or did you hear him say, "I told you a rental car was a good case, or a good bust"?

A. Not to my knowledge, no.

Q. You didn't hear him say that?

A. No.

Q. When you first observed the defendant's car, Officer, and started to make your traffic check, did you say anything to Officer Morrissette while you were together in the car?

A. I might have said we're going to stop that car.

Q. Did he say anything to you?

A. Not to my—I don't know. He might have said okay.

Q. Other than your statement which you may have said, "we're going to stop that car," did you say anything else before you stopped the car?

A. I don't recall. I don't know.

Q. Do you know whether either you or Officer Morrissette

said anything to the other police car that was parked when you first saw the car, or did you signal to that car?

[40] A. I think we had footman's radios that night, and we might have said over the radio we were going to stop this car, yes.

Q. Do you recall whether they said anything back in response to that communication?

A. They might have, said okay, we'll assist, or we'll follow you.

Q. Is it usual for you to have assistance on making a routine traffic check, Officer?

A. I don't know what a routine traffic check is.

Q. I don't either. Let's take out the word routine. Is it usual for you to have assistance in making a traffic check?

A. If another car is in the area they will drive by or assist, yes.

Q. Is it usual for you to have assistance in making a rental agreement check?

A. If another car is in the area, or if they hear the transmission, they will drive by, yes.

Q. When the defendant stopped his car and you pulled behind the defendant, did you say anything to Officer Morrissette, or did he say anything to you as you both proceeded to get out of the car?

A. No, sir. I don't believe so.

Q. At any time after you first saw the defendant, and [41] until Officer Morrissette said, "I have found a gun," save possibly for your statement, "We're going to stop that car," do you recall saying anything to Officer Morrissette, or he to you?

A. I don't remember.

MR. FLEGAL: I have no further questions, Your Honor.

THE COURT: Anything further?

MR. KING: No. I have nothing further, Your Honor.

THE COURT: You may step down.

MR. KING: I call Officer Morrissette, Your Honor.

Your Honor, before we get started may I pass this gun to the bailiff to make sure it's cleared? I'm certain that it is, but I just wanted to double check.

THE COURT: Well, let the other officer check it.

OFFICER JAMES GREGORY MORRISSETTE,

having been called as a witness on behalf of the government,

and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. King:

Q. Officer, state your full name, please?

A. James Gregory Morrissette.

Q. I want you to speak loud enough so that Mr. Flegal and His Honor can hear you.

A. I am Officer James Gregory Morrissette.

[42] Q. Officer Morrissette, what is your duty assignment?

A. Presently assigned to Special Operations Division.

Q. Now, on January 16th, of this year, where were you assigned?

A. I was assigned to Special Operations Division, working casual clothes.

Q. Were you on duty on that date?

A. Yes, sir; I was.

Q. Were you on duty at about 8:00 p.m. on that date?

A. Yes, sir; I was.

Q. Were you a foot patrol, or in a vehicle?

A. Sir, we were riding in a cruiser. It was unmarked.

Q. Now, who is we?

A. Officer Busker and myself.

Q. Now, who was driving this car?

A. Officer Busker.

Q. And you were the passenger?

A. That's correct.

Q. Did you have occasion that evening to make an arrest?

A. Yes, sir.

Q. Would you relate to His Honor, please, the circumstances of that arrest?

A. Yes, sir. Around 8:00 p.m., 8:15, we were sitting in front of the poolhall at, I believe it was the 600 block of T Street. At this time we noticed—Officer Busker noticed a [43] rental vehicle passing us. It had one occupant in it. At that time we pursued the car, which went east on T Street, and made a U-turn on U Street, which was Florida Avenue, heading west on Florida Avenue.

We got to be at Vermont and Florida that Officer Busker —we signaled the man over by using a siren. And at that time we were going to make a spot check.

Q. Now, let me take you to the point where the two cars stopped. Which car was in front, and which car was behind?

A. Sir, the car that we were—the rental car was in front of us.

Q. And the cars were parked on the side?

A. I can't recall, sir.

Q. Now, when the cars stopped, would you relate, please what Mr. Palmore did?

A. What he did?

Q. What he did.

A. Well, when we stopped the car—can I start with what we did, and tie it in?

Q. Okay. Let me ask you what you did when the car stopped?

A. When the car stopped, Officer Busker and myself, we both got out.

Q. Okay. Now, I want you to confine yourself to what you [44] did when you got out?

A. What I did when I got out. I went to the passenger's side of the car that we stopped, and I had a foot——

Q. Now, did you walk directly to the passenger's side?

A. Yes, sir; I did.

Q. Now, where did Officer Busker go?

A. Officer Busker approached the driver—driver's side of the vehicle.

Q. And where was Mr. Palmore at this time?

A. I believe he had the—gotten out of the car. I'm not sure.

Q. Well, where were he and Officer Busker? On which side of the car?

A. They were on the driver's side.

Q. And which side of the car were you on?

A. I was on the passenger's side.

Q. Now, did you go to the driver's side before you went to the passenger's side?

A. No, sir; I did not.

Q. You walked directly to the passenger's side?

A. Yes, sir.

Q. And you got out of the passenger's side of your car; is that correct?

A. That's correct.

Q. Now, after you arrived on the driver's side of the [45] car, what, if anything, did you do?

A. I didn't arrive on the driver's side.

Q. I'm sorry. The passenger's side.

A. I had a flashlight, and I was looking through the window.

Q. Did you observe anything?

A. Yes, sir; I did.

Q. Would you describe, please, what you observed?

A. Yes, sir. On the front seat of the car, under the center-fold armrest, it had an armrest—it was a fold down armrest. I observed what looked to be a pistol. And after closer examination with the light, I knew that it was a pistol definitely.

Q. Now, have you had any experience with firearms?

A. Yes, sir, I do.

Q. What sort of experience with firearms have you had?

A. Just about all kinds.

Q. Well, do you own firearms?

A. Yes, sir; I do.

Q. Have you fired firearms?

A. Yes, sir.

Q. Had you seen weapons similar to the one that you ultimately recovered before?

A. Many times.

Q. Is it fair to say that you would recognize one if you [46] saw one?

A. Yes, sir.

Q. Approximately how far were you standing from the weapon when you saw it?

A. I was just outside of the door. The passenger's door.

Q. And you were flashing a light onto the front seat?

A. Yes, sir.

Q. How much of the gun did you see?

A. I could see the trigger—the hammer mechanism.

Q. Was the rest of the gun, could that be seen as well?

A. No, sir.

THE COURT: Did you say no, sir?

THE WITNESS: No, sir.

By Mr. KING:

Q. Now, after you observed this, what did you do?

A. I signaled my partner, Officer Busker that the man had a gun inside the car.

Q. Did you say that to him?

A. Yes, sir, across the car, because I didn't want to give him a chance to get back in.

Q. And where was Mr. Palmore and Officer Busker at that time?

A. They were just outside the driver's door. Both of them were outside.

[47] Q. And what did you do then?

A. I went around the front of the car, and Officer Busker stayed between the door and Mr. Palmore. I slipped in through the door, lifted up the center fold armrest, and recovered the pistol.

Q. Is that what you recovered? Was that the same thing that you had seen from outside the car?

A. Yes, sir.

Q. I show you what has been marked as Government's Exhibit 2, and ask you if you can identify it?

A. Yes, sir; I can.

Q. And have you seen that weapon before?

A. Yes, sir.

Q. Where have you seen that before?

A. Sir, that was sitting in the—under the center fold armrest in the vehicle that we stopped.

Q. Is that the same weapon that you recovered from the vehicle?

A. Yes, sir.

Q. I show you what has been marked as Government's Exhibit 2-A for identification, and ask you if you can identify that?

A. Yes, sir.

Q. What is it, please?

A. It's a clip to the .45 automatic.

[48] Q. Now, when you recovered the gun, was that clip in the gun?

A. Yes, sir; it was.

Q. Now, Officer, can you estimate, please, approximately how far the gun was from where Mr. Palmore had been sitting in the front seat?

A. It was like when you're sitting in a chair, it would be the right armrest of the chair.

Q. Well, can you estimate in inches how far it would have been from him?

A. I would say with arm's reach. A foot.

Q. About a foot you say?

A. It's not even a foot. It's—your elbow can rest on the armrest.

Q. Now, was this gun subsequently test fired?

A. Yes, sir; it was.

Q. Were you present when that took place?

A. Yes, I was.

Q. What was the result of that test fire?

A. Sir, it fired.

MR. KING: I don't have anything further, Your Honor. Thank you, Officer.

CROSS-EXAMINATION

By MR. FLEGAL:

Q. Officer, when you first observed the defendant's car, [49] did Officer Busker say anything to you, or did you say anything to him when you were parked in front of the pool-hall, I believe you said it was, when you saw his car?

A. That's correct.

Q. Did you or Officer Busker exchange words?

A. Officer Busker, he identified it as being a rental car.

Q. He told you it was a rental car?

A. Yes, sir.

Q. Did he say anything else to you?

A. Not that I can remember.

Q. What significance did you attach to the fact, if any, that it was a rental car?

A. A rental car?

Q. Yes. Officer Busker had told you it was a rental car?

A. That's correct.

Q. What significance, if any, did you attach to that comment?

A. There are rental cars that are overdue from being taken back into the station.

Q. How do you know that?

A. Sir, because we have a stolen sheet that's issued daily in the Special Operations Division, along with other precincts that has a list of stolen vehicles, or reportedly unreturned vehicles.

[50] Q. Uh huh. The rental companies report them as overdue, and it ends up on your stolen list?

A. After a certain period of time.

Q. Right. Did you have such a sheet with you that night, Officer?

A. I can't recall, sir.

Q. Do you recall this vehicle—this particular vehicle—being on such a sheet?

A. No, sir.

Q. Officer Busker was driving, as I understand it?

A. That's correct.

Q. When he started to follow the vehicle, what did you think he was doing?

A. I figured we were going to spot check the vehicle.

Q. What's a spot check, sir?

A. Sir, it's when you pull over a vehicle just to find out if the driver is the owner of that vehicle, or if the driver has or has not a driver's license. You check on the stolen, and you also check on the W.A.L.E.S., which is to see if it has any parking violations out on it.

Q. I didn't—you check on a——

A. It's called W.A.L.E.S. Washington Area Law Enforcement Service.

Q. Thank you, sir. Did you ever receive any instructions, Officer Morrissette, as to making spot checks, either written [51] or oral?

A. Oh, yes. Yes, sir.

Q. How many times?

A. I couldn't give you numbers. It's been said at roll call.

Q. Frequently?

A. Several times.

Q. Several times?

A. Several times.

Q. Did you ever see any written instructions on spot checks?

A. I can't say I have, no. They have issued us sheets that they write down when we make a spot check. We have a sheet that has spaces for information that the department would like. They would like to have the name, the address of the person driving, the color of the vehicle, the tag number, the driver's permit number, and the color, the number of occupants in it.

Q. Anything else?

A. The year, the make. I said the name of the driver, and

his address, his age, his height, weight, everything that's on your driver's permit.

Q. And this is a police department form, or a spot check form? What would you call this form?

A. I can't say it was a police department form, because [52] I believe the police department numbers every form, and I don't believe that there is a number on this form.

Q. Where did you get these forms?

A. They are handed out in the special operations division.

Q. By special operations division——

A. They have a shelf in the file cabinet.

Q. And while you were on special operations division duty, do you note the spot checks you make on such a form and turn them in?

A. Yes, sir.

Q. How many spot checks had you made on January 16th, the date in question, Officer?

A. I don't recall, sir.

Q. More than one?

A. I can't recall that.

Q. Do you recall making—do you recall a spot check other than Mr. Palmore's?

A. No, sir.

Q. What time did you go on duty that day?

A. We were—let's see. I was working—that was 2:00 to 10:00.

Q. And this was approximately 8:00 p.m. in the evening that this incident took place?

A. That's correct.

[53] Q. Do you recall making a spot check—were you on duty the day before this incident?

A. Sir, I couldn't tell you.

Q. How about the day after?

A. I don't know. It might have been my day off. We don't have days off following each other.

Q. Officer Morrissette, when you make a spot check, what information, or what directions did special operations division give you as to those spot checks, if any?

A. You mean as to what cars we may stop?

Q. Uh huh.

A. We could stop the kind of car that maybe a young teenager would be driver that you might think that he was under age and didn't have a permit. You could stop a car

that you suspected might be stolen. You could stop a car that just for not even having a taillight, you can stop the car, and when you inform the driver of the car that his taillight is out you also ask him for his permit and registration.

Q. Officer, have you ever stopped a car which did not have a taillight or a defect which was not driven by a juvenile, which was not a rental car, which you didn't have reason to suspect was stolen, driven by a businessman in a suit, for a spot check?

A. Would you like to repeat that again?

Q. Yes. Have you ever, in your experience with S.O.D. [54] stopped for a routine spot check a car that did not have a taillight or any other mechanical defect, that you observed, that was not driven by a young driver, that was not a rental car, that you didn't believe was stolen, that you had no other basis to single it out from all the other cars, that was driven by a businessman in a suit?

A. I can't recall either way. I could possibly have.

Q. But you don't recall?

A. Normally it wouldn't be my policy.

Q. It would not be your policy?

A. I'm not saying——

Q. But if you had, it would be an exception, and not your policy?

A. I would say so. Yes, sir.

Q. Officer, from the time you left the car, until you observed the gun, what period of time did you suspect elapsed —you estimate elapsed?

A. Maybe two minutes.

Q. What were you doing during those two minutes?

A. Standing on the outside of the passenger's side.

Q. Just standing?

A. Yes, sir. I was observing everything that might be inside the car.

Q. Did you kneel to observe? Crouch down?

A. I didn't. No, I did not kneel, and I did not crouch [55] down.

Q. How did you observe it?

A. Let me see. I didn't see it standing erect. I could see something, but from closer examination, by bending my torso, I could identify what is was.

Q. Okay. Were the windows on the passenger's side open, Officer, or were they closed, rolled up?

A. No, sir. They were closed.

Q. When you and Officer Busker arrived behind Mr. Palmore's vehicle for the spot check, did you say anything to Officer Busker, or did he say anything to you as you exited your car?

A. I can't recall.

Q. What is the purpose of a spot check, as far as you understand it, Officer?

A. It's what I said earlier. Driver's license, registration.

Q. All right. Anything else?

A. I told you. You find out if the car has warrants on it, if it's stolen, if the man has a permit, if he has any felony warrants out for him.

Q. Fine. When you went over to the right-hand side, or the passenger's side of the car, did you expect to find an operator's permit?

A. No, sir, I did not.

[56] Q. How about a registration certificate?

A. You say myself? Did I?

Q. Uh huh. Yourself.

A. No, sir.

Q. Rental agreement?

A. No, sir.

Q. Any information that the car was stolen?

A. No, sir.

Q. What did you expect to find? What were you looking for?

A. I stand on the other side of the car for the protection of my partner, and that's the only reason that we have to stay on the other side of the car.

Q. Was there another police vehicle with you when you made this spot check, Officer?

A. Yes, sir; there was.

Q. And where did it stop relative to your car?

A. That was right behind us.

Q. And did those officers get out of their car? If you know.

A. I believe one did. I'm not sure about the other.

Q. Do you know what he did?

A. The officer that I remember getting out of the car, he came up on the side of the car that I was on.

Q. And helped you look?

[57] No, I wouldn't say he helped me look. He just asked me why we stopped him, I guess. I don't remember what he said.

Q. Do you remember, Officer, after you found the gun, making a comment to Officer Busker, or to anyone else, "I told you a rental car was a good case, or a good bust," or any words to that effect?

A. No, sir.

Q. Did you at any time, Officer Morrissette, before you saw the gun, enter the car?

A. Before I saw the gun?

Q. Uh huh.

A. No, sir.

Q. Did you ever open the trunk of that car?

A. I believe I did.

Q. When?

A. I believe it was at the station.

Q. Did you ever open the trunk of the car on the street location?

A. I can't recall.

Q. Could you have?

A. I could have, yes.

Q. Would it have been your policy to do so?

A. Not on my own.

Q. What would it take to get the trunk open, if it wasn't on your own?

[58] A. It would be since I was not the senior officer, and I'm not that familiar with the type of searches, I would let the senior officer do it.

Q. And do you recall—you would let the senior officer give you the instructions, or open it himself?

A. Sir?

Q. Let the senior officer do what, sir?

A. If the senior officer wanted to search the trunk, then I would open it up.

Q. And who was your senior officer that night?

A. That was Officer Busker.

Q. Do you recall whether or not Officer Busker gave you such instructions?

A. On the scene?

Q. Yes.

A. No, sir.

Mr. Fingal: I have no further questions, Your Honor.

The Court: Any redirect?

Mr. King: Just one or two matters of redirect, Your Honor.

REDIRECT EXAMINATION

By Mr. King:

Q. Officer, you testified that when you went on the right-hand side of the car, that you did it for the protection of the other officer; is that correct?

[59] A. That's correct, sir.

Q. Now, while you were there, did the defendant remain outside the car the entire time, do you recall?

A. Are you saying that once he got out of the car from the traffic stop, did he enter the car again?

Q. Yes.

A. Yes, sir; he did.

Q. Did you see why he entered the car?

A. He was getting, I thought it was the registration, out of the glove compartment.

Q. Now, you say that you go to the other side of the car for the protection of the officer?

A. Right.

Q. Would you explain what you mean by that?

A. Simple. The man that—say if he got out of the car, he was going back in, my partner is at a disadvantage, because he couldn't see around the man. The man could feasibly have a gun in the glove compartment. He could have numerous things in the glove compartment that he could be charged with.

Q. And your purpose in standing there is to observe what the man does when he entered the car, or what may be within his reach; is that correct?

A. That's correct, sir.

Mr. King: I have nothing further, Your Honor.

Mr. Fingal: One question, Your Honor.

[60]

RECROSS-EXAMINATION

By Mr. Fingal:

Q. You said that he may have, as I understood your testi-

mony, Officer, something in the glove compartment that he may be charged with?

A. Go ahead.

Q. Is that what you said?

A. That's what I said.

Q. What did you mean?

A. What I meant was guns, knives.

Q. Something that would constitute a criminal offense?

A. That could be harmful to my partner.

Q. And also constitute a criminal offense?

A. I didn't say that.

Q. What did you mean when you said charged with, sir?

A. Sir?

Q. What did you mean when you said charged with?

A. If the man leaped into the glove compartment and came out with a knife, he could be charged with that.

Q. Fine. Thank you, sir.

MR. KING: Nothing further, Your Honor.

THE COURT: You may step down.

MR. KING: Your Honor, we have nothing further at this hearing.

MR. FLEGAL: The defense will have no rebuttal, Your [61] Honor.

THE COURT: Well, now we're in a rather unusual situation. We started out to hear a motion to suppress, and there was a withdrawal of a demand for a jury trial. I don't know that there is much more that could be heard on the whole case. Does counsel wish to put on anything more on the case as a whole? It would seem to me that the matter can be disposed of in its entirety without having a ruling on the motion, and——

MR. FLEGAL: Your Honor, may I just briefly outline the procedure that Mr. King and I have discussed at some length, and I think we have——

THE COURT: Should I read this stipulation first?

MR. FLEGAL: It's perfectly all right with me if you will, and we can explain it when we—we were a little more detailed than Your Honor was, and I want to explain what we had contemplated, which was after Your Honor ruled on the motion to suppress, that we would enter into a stipulation, such as I have handed up to Your Honor, that you might consider the testimony of the police officers given at the hearing as if repeated before you at a trial, and then

you will notice that we have two technical matters which we have stipulated to, and the reason we did it this way is we want to be very sure—the defense wants to be very sure of two things: First, that it protects its evidentiary objection in the event we don't prevail [62] on the motion to suppress, and second, that the defendant had elected to exercise his right under *Simmons* to testify at the suppression hearing, but he may not wish to exercise that right at trial, and I think that the stipulation we have proposed meets the very practical point Your Honor has raised and does so in a procedurally fair way.

Mr. Kuhn: I would ask Your Honor however to rule first on the motion to suppress, and then take up the matter of trial, which would in effect be a stipulation as to what you have already heard, just to separate out the two entities.

The Court: Well, I'm prepared to rule on the motion. It just occurred to me that this would be an expeditious way of handling the matter, and apparently you two came to the same conclusion.

So far as the motion is concerned, do either one of you want to be heard?

[Arguments on the motion to suppress were stenographically recorded, but are not transcribed herein.]

The Court: I don't view these things quite the same way that you apparently do, and I think that Courts are required—indeed, I think many of the decisions require the Courts, by what they say to judge of these things in the light of what a reasonable officer would do under like circumstances and not as judges and lawyers would do in a courtroom later on viewing it dispassionately and calmly, and I think if I were a [63] police officer out there on the street, and I was refused a registration or a rental agreement which I asked for, and the man wanted to take off, I would immediately suspect that I had a felon of my hands, and I don't think this is unreasonable even under the Fourth Amendment to the Constitution, and if you think so, and the Court of Appeals agrees with you, then I shall be reversed, because I don't follow you on the law.

Mr. Fineman: I'm sure Your Honor understands the points that I have been trying to make, and——

The Court: I think I do.

Mr. Fineman: I think Your Honor does, and that's all anyone can ask for is the consideration.

THE COURT: Yes. I think I understand it, and I see your reasoning, but I just don't agree with it.

MR. FLEGAL: That's happened before, Your Honor.

THE COURT: Listen, I dare say, not too often, but it has happened that I have been reversed, and I dare say it shall happen again. I don't seek reversals, but I must call the law as I think I see it. I think I understand your proposition, and very frankly I don't agree with it.

MR. FLEGAL: I appreciate that, sir.

THE COURT: All right, sir.

I may say further, Mr. Flegal, that when you asked the officer if he had refused to show you that rental agreement would you have allowed him to leave, how easy it would have been [64] for the officers, if they were trying to cover up something, to have said yes, if he had said no, I would have let him go.

MR. FLEGAL: That's frequently——

THE COURT: I think these officers were quite honest in what they said and did, and I frankly at this point don't see anything that's illegal or unconstitutional about their actions.

Now, you in your stipulation said you wanted to object as to the test firing. I don't quite understand what you mean by that.

MR. FLEGAL: What we're trying to do, Your Honor, is just to be very sure that we don't run into that buzz saw that happened several years ago in the Court of Appeals when testimony as to a gun comes in any other way, and they say they don't have to reach the suppression hearing the defendant is raising.

THE COURT: There was testimony in this case, by Officer Morrissette, that he was present and saw the gun test-fired.

MR. FLEGAL: Correct. Correct. And what we are prepared to stipulate is that the officers' testimony, that is Officer Busker, and Officer Morrissette, may be considered by Your Honor at trial just as they gave it at the motion to suppress without being repeated, and then that we now object to all testimony relating to the gun allegedly taken from the [65] defendant's vehicle on January 16th for the reasons set forth in our motion to suppress, and as adduced at the hearing.

THE COURT: Well, on that basis I will overrule your motion.

Mr. Fineman: Fine. And our objection.

The Court: Any deny the suppression motion. Where do we go from here, gentlemen?

Mr. King: I think perhaps we announce the case, and then——

The Court: Well, is there more testimony to be put on beyond what I have heard on the case as a whole?

Mr. King: No, Your Honor.

The Court: Does the defendant wish to put on any testimony beyond what he has put on?

Mr. Finegal: No, Your Honor.

Excuse me, I want to make it very clear the defendant hasn't put on any testimony in trial.

The Court: I understand that.

Mr. Finegal: Right.

The Court: But I mean assuming that he has, that I'm not regarding what he said as testimony, and I am not regarding what his witness said as testimony. You are standing on the government's case, and on your motion for a finding for the defendant at the end of the government's case?

Mr. Finegal: Correct, Your Honor. And, of course, on [66] our evidentiary objection which we've technically made for the record, and your——

The Court: Yes. I understand that.

Mr. King: And, of course, the government would formally wish to move into evidence the gun, and the clip.

The Court: All right. Now, I take it your objection to the receipt of those in evidence is the same objection you made before, sir?

Mr. Finegal: Same objection. We object on the grounds set forth on our motion to suppress and adduced at the hearing.

* * *

[69] Mr. King: The stipulation does provide, I think, Your Honor, that the defendant was not licensed to carry a gun, and the gun was test fired. I believe that's what it says.

Mr. Finegal: It does, Your Honor.

The Court: Yes. Well, the stipulation will be filed in the case.

I take it there's no objection to that?

Mr. Fineman: Oh, no. In fact, I think it should be, [70] Your Honor.

THE COURT: And the objections to Government Exhibit's 2 and 2-A will be overruled, and they will be admitted.

[Government's Exhibits No's. 2, and 2-A, previously marked for identification, were received in evidence.]

MR. KING: Very well, Your Honor.

THE COURT: Now, is there anything further that anybody wants to submit or to say about the case in chief?

MR. KING: No, Your Honor. At this point the Government rests.

THE COURT: Mr. Flegal.

MR. FLEGAL: At this point, Your Honor, the defendant stands on his pretrial motion, and his trial objections, and the defendant will also rest.

MR. KING: Your Honor, just one other point. With respect to this stipulation, since it amounts to a stipulation by the defendant of essentially all his case, which is very similar, although——

THE COURT: The what case?

MR. KING: It's essentially all his case, and I wonder if Your Honor would direct questions to the defendant inquiring of him whether he fully understands, for the record, the significance of this stipulation. This is very similar to the case wherein the U. S. Court of Appeals recently—there was a stipulation as to testimony, and then the sole issue [71] at trial was an insanity defense. The Court of Appeals reversed on the ground that the Court had not addressed itself directly to the defendant and inquired of him if he fully understood the nature of the stipulation, and what rights, and what have you, that he was giving up as a result of that stipulation.

THE COURT: And you say that had to do with a stipulation?

MR. KING: Yes. In that case it was a stipulation. They analogized it to a guilty plea. They said it wasn't exactly the same.

THE COURT: Was this the United States Court of Appeals?

MR. KING: Yes, Your Honor.

THE COURT: I thought so.

MR. FLEGAL: Your Honor, I wanted to make it clear, I will be happy to have Your Honor do that, because I dis-

cussed this at length with Mr. Palmore yesterday, but, of course, we are not stipulating the whole case; we're merely stipulating the testimony.

THE COURT: I understand.

MR. KING: And I simply want to be sure that the record is clear.

THE COURT: Out of an abundance of caution, although I have much more confidence in the District of Columbia Court of [72] Appeals, I will ask the defendant.

MR. FLEGAL: Could I assist Your Honor perhaps on that, since I know what happened, and ask him a few preliminary questions?

THE COURT: I have no objection.

MR. FLEGAL: Mr. Palmore, yesterday you recall discussing with me the preparations for the trial today?

MR. PALMORE: No.

MR. FLEGAL: Do you remember having a conference with Mr. Best and me yesterday for about an hour and a half? Mr. Best is an attorney in my office.

THE COURT: Mr. Palmore, suppose you come up here where I can hear you better. You may assume, Mr. Palmore, that you're still under oath to tell the truth.

MR. FLEGAL: And do you recall during that conference, Mr. Palmore, that we discussed at some length the proposed stipulation that we would file here concerning a waiver of your trial by a jury and the legal issue of the illegal search that we were going to submit to the judge?

MR. PALMORE: Yes.

MR. FLEGAL: Did we discuss that in full?

MR. PALMORE: Yes.

MR. FLEGAL: Do you understand what we have done in that?

MR. PALMORE: Yes, I do.

[73] MR. FLEGAL: Okay. You understand that technically we have the right to call the officers back to the witness stand to make them repeat their testimony before Judge Korman?

MR. PALMORE: Yes.

MR. FLEGAL: All right. And that we have proposed a stipulation they need not repeat that testimony, but that Judge Korman may consider the testimony they gave this morning during the motion, and this afternoon during the motion, just as if it was trial testimony?

MR. PALMORE: Yes.

MR. FLEGAL: All right. And you understand that we are further proposing to stipulate that on January 16th you did not have a license to carry a gun?

MR. PALMORE: Yes.

MR. FLEGAL: And you understand that we're further stipulating, again subject to our constitutional argument, legal search issue, that the gun which the officers say they found worked?

MR. PALMORE: Yes.

MR. FLEGAL: All right. Do you have any questions about those?

MR. PALMORE: No.

THE COURT: All right. And you have discussed all of this with your attorney?

MR. PALMORE: Yes, Your Honor.

[74] THE COURT: And you are perfectly satisfied that he is a good attorney?

MR. PALMORE: Yes.

THE COURT: And you are satisfied with the advice he's given you?

MR. PALMORE: Yes.

THE COURT: I would like to add to the record that I think he's a good attorney too.

You can step down, sir.

MR. FLEGAL: The defense rests, Your Honor.

THE COURT: All right.

Well, I have no difficulty in arriving at a conclusion as to the defendant's guilt, because having admitted the gun in evidence, and by virtue of the stipulation that he had no permit to carry it, and by virtue of my view of the law that the gun was properly seized by the officers, it seems to me that the charge laid against the defendant has been made out in totality in the light of those findings and conclusions, so accordingly I find the defendant guilty of the charge laid in the indictment, which is thereon or about January 16, 1971, within the District of Columbia, the defendant carried, either openly or concealed, on or about his person, and not in his dwelling house, and not in a place of business of his, and not on other land possessed by him, a dangerous weapon capable of being so concealed; namely, a pistol, and that he had no [75] license therefor issued as provided by law.

I don't anticipate that you will argue that the street is land owned partially by him?

Mr. Fraser. No such contention. I have made many others, but not that one.

* * *

[Caption Omitted]

STIPULATION

The parties stipulate as follows:

1. Trial by jury having been waived, the Court may consider the testimony of Officer Busker and Officer Morrissette given at the hearing on defendant's motion to suppress evidence as if such testimony had been repeated at trial subject, however, to defendant's right to object to such testimony on the grounds set forth in the motion to suppress evidence and/or advanced at the hearing thereon.

2. Subject to defendant's right to object as aforesaid, the gun which the officers testify was taken from the automobile being operated by defendant on January 16, 1971 was subsequently test fired and it fired one round.

3. On January 16, 1971, defendant did not have a permit or license to carry a gun in the District of Columbia.

/s/ Warren R. King
WARREN R. KING
Assistant United States Attorney

/s/ Frank F. Flegal
FRANK F. FLEGAL
Attorney for Defendant

APPROVED:
/s/ Korman, J.
Judge
[filed in open court 3/30/71]

Judgment

April 27, 1971

Judge Korman

2-6 years. Defendant will serve 6 months. Execution of remainder of sentence suspended. Probation six (6) years. Defendant committed w/o bond pending appeal.

[Caption Omitted]

NOTICE OF APPEAL

Notice is hereby given that Roosevelt F. Palmore, the defendant herein, appeals to The District of Columbia Court of Appeals from the judgment of conviction of this court entered on the 27th day of April, 1971.

[Signature omitted]

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 5831

ROOSEVELT F. PALMORE, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the District of Columbia

(Argued October 19, 1971 Decided April 28, 1972)

[Judgment entered this date]

Frank F. Flegal for appellant.

James A. Adams, Assistant United States Attorney, with whom *Thomas A. Flannery*, United States Attorney, *John A. Terry* and *Warren R. King*, Assistant United States Attorneys, were on the brief, for appellee.

Before KELLY, KERN and NEBEKER, Associate Judges.

KERN, *Associate Judge:* Appellant was tried and convicted in the Superior Court of the District of Columbia of a "local" felony, that is, carrying a dangerous weapon (a pistol), after having sustained a prior felony conviction, D.C. Code 1967, § 22-3204.[1] He contests the jurisdiction of the Superior Court to hear his case[2] because he alleges that only a federal court created under article III of the Constitution has jurisdiction over a felony proscribed by

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[1] The full facts of this case are set forth in Part II of the opinion

[2] The "District of Columbia Court Reform and Criminal Procedure Act of 1970," Pub. L. No. 91-358, 84 Stat. 475 (1970) vests jurisdiction in the Superior Court of the District of Columbia over criminal cases under any law applicable exclusively to the District. Such jurisdiction vests in two stages over an eighteen month period, commencing with the effective date of the Act, 84 Stat. 486, D.C. Code 1967, § 11-923 (Supp. IV, 1971). The Act vests in this court jurisdiction over the appeals from all final orders and judgments of the Superior Court, 84 Stat. 480, D.C. Code 1967, § 11-721 (Supp. IV, 1971). Under the Act, the Superior Court and this court receive their judicial power from Congress pursuant to article I of the Constitution, 84 Stat. 475, D.C. Code 1967, § 11-101(2) (Supp. IV, 1971). The Court Reform Act further provides that the judges of the Superior Court and this court shall be subject to tenure, salary, and removal provisions which are not within the confines of article III (see note 3, *infra*), 84 Stat. 491, D.C. Code 1967, § 11-1502 (Supp. IV, 1971); 84 Stat. 479, 488, D.C. Code 1967, §§ 11-703, 904 (Supp. IV, 1971); 84 Stat. 488, D.C. Code 1967, § 11-1521 (Supp. IV, 1971).

Congress and prosecuted in the name of the United States. Appellant also launches an attack upon the validity of (1) a search of and seizure from his automobile, and (2) a decision by the Government to prosecute him under one statute rather than another. After a review of each of his contentions, which have been ably and vigorously presented in briefs and supplemental memoranda submitted at our request after oral argument, we *affirm* his conviction.

I.

Appellant bases his formidable challenge to the jurisdiction of the Superior Court and this court upon the language of article III which states that the judicial power of the United States shall extend to all cases arising under the laws of the United States and to which the United States is a party.[3] He points out (a) that the sections of the D.C. Code, despite being applicable only to the District of Columbia, constitute the "Laws of the United States," *Metropolitan R.R. Co. v. District of Columbia*, 132 U.S. 1, 9 (1889) (dictum); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426 (1821) (dictum), and (b) that the United States is a party to any case in which it prosecutes an individual for a violation of the D.C. Code.

Appellant contends that when a case or controversy, such as his, falls within the "judicial Power of the United States," as defined in article III, Congress cannot constitutionally confer jurisdiction over that case upon a non-article III court. He acknowledges that Congress has created under article IV[4] courts without life tenure for their members to sit in the federal territories and that

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[3] U.S. Const., art. III reads in pertinent part:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States. . . .

[4] U.S. Const., art. IV, § 3, cl. 2 reads in pertinent part:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . .

these courts do have jurisdiction over cases and controversies arising under the laws of the United States and to which the United States is a party. *O'Donoghue v. United States*, 289 U.S. 516 (1933); *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828); *United States v. Montanez*, 371 F.2d 79 (2d Cir.), *cert denied*, 389 U.S. 884 (1967). However, he relies upon the fact that the Supreme Court has emphatically recognized the significant constitutional distinction between territorial courts and the District of Columbia courts. *O'Donoghue v. United States, supra at* 538.[8]

In further support of his argument,[9] appellant notes that individuals charged with violations of "local" felonies in the District have been tried by federal courts created under article III, at least since 1863, when the predecessor of the present United States District Court for the District of Columbia was created by Congress.[10]

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[8] The Government contends (a) that the distinction drawn by the decision in O'Donoghue v. United States, 289 U.S. 516 (1933) (which we discuss fully in n.15, *infra*), may no longer be sound, and (b) that Congress should be given the same freedom in fashioning local District courts under article I as it has enjoyed in creating the territorial judicial systems under article IV. The Government argues that, as is true with respect to the territories, (i) Congress does have plenary legislative power over the District, a specific geographic area; and, (ii) the area may someday become a state (or enjoy such local control that it is able to act independently of Congress) capable of creating its own judicial system so as no longer to be in need of a large number of lifetime article III judges whose principle function had been to adjudicate local matters, *see Glidden Co. v. Zdanok*, 370 U.S. 530, 543-48 (1962).

Notwithstanding a certain appeal of the Government's position, this court is, of course, still bound by the Supreme Court's decision in *O'Donoghue*, which unambiguously rejected the notion that Congress could exercise the same power over the courts of the District as it does with respect to the territorial judicial systems.

[9] *See also* Note, *Legislative and Constitutional Courts*, 71 YALE L. J. 979, 1010-11 (1962); and Note, *The Distinction Between Legislative and Constitutional Courts and its Effect on Judicial Assignment*, 62 COLUM. L. REV. 122, 154 (n. 149) (1962), which take the position that as to D.C. felonies, there appears to be no justification for avoiding the provisions of article III guaranteeing lifetime judges and undiminishable salary, especially in view of the close proximity between the Congress and the local courts.

[10] From 1801 until 1863, exclusive jurisdiction over local felonies committed in the District was vested by Congress in the circuit court of the District of Columbia (and the chief circuit judge sitting as a district judge) which was the only existing court of either general or federal jurisdiction in the District. The judges of the circuit court exercised the same powers, and

We believe that neither case law nor history and logic support appellant's argument that Congress *must* vest jurisdiction over local felonies *only* in article III courts. We conclude that Congress, in the exercise of its plenary power under article I,[8] has the constitutional power to proscribe certain criminal conduct only in the District and to select the appropriate court, whether it is created by virtue of article III or article I, to hear and determine these particular criminal cases within the District.

We begin with the established proposition that Congress, at least with respect to courts in the District, is enabled by the District Clause (U.S. CONST., art. I, § 8, cl. 17) to confer a "judicial power," wholly separate and apart from its authority under article III to confer judicial power on inferior federal courts. *National Mutual Insurance Co. of D.C. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949);[9]

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enjoyed the same salary and tenure, as did the circuit judges sitting on inferior federal courts created by virtue of article III in the several states, 2 Stat. 103-06 (1801); 2 Stat. 155, 166 (1802).

In 1838, Congress created the criminal court of the District of Columbia which assumed the jurisdiction over all criminal offenses committed in the District which had been vested in the circuit court. The judge on the criminal court did not enjoy the same salary as judges on the inferior federal courts nor did the statute specify (as did the statute creating the circuit court), whether this judge enjoyed the tenure of inferior federal court judges, 5 Stat. 306 (1838). *Compare* 2 Stat. 660 (1811) and 3 Stat. 457 (1813).

The criminal court was abolished in 1863 and its jurisdiction was transferred to the newly created supreme court of the District of Columbia which also enjoyed the same powers as federal district courts created under article III in the several states, 12 Stat. 762, 763 (1863). It was not until 1933, however, that the Supreme Court decided that the supreme court of the District of Columbia was created by Congress by virtue of article III, O'Donoghue v. United States, *supra*. *See generally* Glidden Co. v. Zdanok, *supra* at 539, and the briefs submitted by the Solicitor General (at 41), and by Roger Robb, (now a judge of our federal Circuit Court), amicus curiae (at 30 *et seq.*) in the latter case.

[8] U.S. CONST., art. I, § 8, cl. 17 reads in pertinent part:

> The Congress shall have power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States. . . .

[9] Although the four separate opinions filed in *Tidewater* each expressed a different view as to the power of Congress under the District Clause to clothe inferior federal courts in the several states with jurisdiction over matters outside of article III, each opinion did concede that Congress can confer some measure of judicial power under article I upon courts in the District of Columbia, Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co., 337

Kendall v. United States, 37 U.S. (12 Pet.) 524, 619 (1838); *Lurk v. United States*, 111 U.S.App.D.C. 238, 296 F.2d 360 (1961), *aff'd on different grounds*, 370 U.S. 530 (1962); *Western Urn Manufacturing Co. v. American Pipe and Steel Corp.*, 109 U.S.App.D.C. 145, 284 F.2d 279 (1960), *sustained*, 113 U.S.App.D.C. 378, 308 F.2d 333 (1962); *Pang-Tsu Mow v. Republic of China*, 91 U.S.App.D.C. 324, 201 F.2d 195 (1952), *cert. denied*, 345 U.S. 925 (1953). Congress has not only utilized the District Clause to vest in article III courts here jurisdiction over cases and controversies *not arising under article III*, *e.g.*, *National Mutual Insurance Co. of D.C. v. Tidewater Transfer Co.*, *supra* (diversity jurisdiction outside of article III limitations); *Kendall v. United States*, *supra*, (common law mandamus); *Western Urn Manufacturing Co. v. American Pipe and Steel Corp.*, *supra* (suits between non-resident corporations); *Pang-Tsu Mow v. Republic of China*, *supra* (suits between aliens); but Congress has *also* employed the District Clause to permit non-article III judges to hear and determine local misdemeanors [10] and local felonies, *Lurk v. United States*, *supra*,[11]

U.S. 583, 591-92, 600; 608-09 (Butledge, J., concurring); 641, 643 (Vinson, J., dissenting); 655 (Frankfurter, J., dissenting) (by inference).

See also the remarks by Mr. Justice Frankfurter at the oral argument in Glidden Co. v. Zdanok, *supra*, with regard to the power of Congress to vest jurisdiction over local felonies in non-article III courts in the District of Columbia, 30 U.S.L.W. 3261-63 (1962).

[10] Appellant concedes that the power to hear cases involving misdemeanor violations of the D.C. Code has been constitutionally vested by Congress in local courts not created by virtue of article III whose judges have always served for a period of years with compensation unequal to that received by judges on inferior federal courts. This includes the justices of the peace who had jurisdiction over local misdemeanors prior to the creation of the police court in 1870 (16 Stat. 153) and continuing on through to the judges of the municipal court who received the police court jurisdiction in 1942 (56 Stat. 196) until the predecessor of the present Superior Court, the Court of General Sessions, received this jurisdiction in 1963 (77 Stat. 487). The Supreme Court's reference in Callan v. Wilson, 127 U.S. 540 (1888) to the article III right to criminal jury trial before a local justice of the peace court has not been interpreted as a recognition of article III status of that court, but rather, that the fifth and sixth amendment rights to due process of law and criminal jury trial are applicable to all criminal trials in the District of Columbia, *see* Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., *supra* at 650 n.14 (Butledge, J., concurring); Neild v. District of Columbia, 71 App. D.C. 306, 316 n.19, 110 F.2d 246, 256 n.19 (1940).

[11] Contrary to appellant's contention, the author of the majority opinion in Glidden Co. v. Zdanok, *supra* at 537, 549, Mr. Justice Harlan, did not ignore or repudiate the holding of the Circuit Court in Lurk v. United States,

Bradford v. Green, Civil Action No. 3527-70 (D.D.C. 1971), *aff'd on other grounds*, 142 U.S.App.D.C. 237, 440 F.2d 265 (1971). If Congress, within the District, can *constitutionally* vest a species of judicial power upon District courts free of the limitations contained in article III, then it follows that Congress, in the exercise of its "necessary and proper powers" under U.S. CONST., art I, § 8, cl. 18, is entitled to fashion an entire court system, free of the tenure and salary limitations imposed by article III, to receive this same judicial power over "local" crimes and civil cases.

There may be, of course, substantial and persuasive reasons for creating all courts in the District with lifetime tenure and undiminishable salary for judges so as to be completely free of possible legislative influence. *See generally O'Donoghue v. United States*, *supra* at 531-33; *Evans v. Gore*, 253 U.S. 245, 253 (1920); *Legislative and Constitutional Courts*, 71 YALE L.J., *supra* at 1010-11; *The Distinction Between Legislative and Constitutional Courts*, 62 COLUM. L. REV., *supra* at 154 n. 149. However, Congress has chosen in its legislative wisdom to follow the example of numerous states [12] which do not provide for such tenure or salary, and we find this choice to be a legitimate means by which Congress may accomplish the permissible end of creating a "local" court system under the District Clause, *United States v. Jacobs*, 306 U.S. 363, 371 (1939); *Nebbia v. New York*, 291 U.S. 502, 525 (1934); *Neild v. District of Columbia*, 71 App.D.C. 306, 312, 110 F.2d 246, 252 (1940).

We next consider appellant's historical argument: That in the District of Columbia, Congress, at least since 1963,[13] has conferred jurisdiction over local felonies in article III courts and therefore it cannot *now* be permitted to withdraw that jurisdiction from these courts and vest it in an article I court system.

First, it is by no means clear that when Congress vested

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111 U.S.App.D.C. 338, 296 F.2d 360 (1961). Justice Harlan's scholarly opinion amply confirms the results of the inquiry which he made of the Solicitor General at the oral argument: That the principle upon which the Circuit Court based its holding would not serve as a single means for deciding both the *Lurk* case involving a D.C. felony and the *Glidden* case involving a New York diversity suit, 370 U.S. at 538. *See also* 30 U.S.L.W. 3263 (1962).

[12] Forty-six state constitutions do not provide for life tenure for trial judges who hear and determine state felony cases, Appellee's Supp. Memo. 9-11.

[13] *See* note 7, *supra*.

jurisdiction over *local* felonies in the courts of the District of Columbia, it did so because those cases arose "under the laws of the United States" within the meaning of article III. Of course, these local crimes were violations of laws of the United States, i.e., Acts of Congress, but, were they the types of cases arising under "the Laws of the United States" over which article III directs Congress to vest jurisdiction in inferior *federal* courts?" The historical record is, for all practical purposes, silent as to the particular constitutional power Congress thought it was exercising when it created the first courts in the District and conferred jurisdiction upon them. We must therefore turn to the *type of jurisdiction* conferred by Congress to determine which article of the Constitution Congress may have relied upon to confer that jurisdiction. *See generally Ex parte Bakelite Corp.*, 279 U.S. 438, 459 (1929).

In 1801, Congress created the first District of Columbia felonies when it reenacted for the District of Columbia the laws which had been applicable to those particular areas of Maryland and Virginia ceded to the United States for the District, 2 Stat. 103, 104 (1801); *see Kendall v. United States, supra* at 619. It seems quite unlikely that Congress intended to transform the offenses committed by the residents of the ceded areas against their local statutes into general federal offenses triable under article III in lower federal courts. To have done so would have been to create a unique form of federal criminal jurisdiction because (i) the conduct proscribed by Congress in the District of Columbia Code, unlike general federal offenses, could have occurred only in one specific geographical area, and (ii) inferior federal courts created under article III to sit throughout the several states have never been capable of

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[illegible] Appellant contends that the "judicial Power of the United States," as defined in article III, must extend to all cases arising under the laws of the United States. We disagree. Quite clearly, judges in the state courts, as well as judges who derive their sole power from article I (*e.g.*, D.C. misdemeanors and cases and controversies before "legislative courts," see Burns, Inc. v. Commissioner, 27 T. C. No. 30, at 8 (1971)) and article IV (territorial) judges have heard and determined cases arising under the laws of the United States since the very earliest days of our history. *See generally* Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co., *supra* at 618 (Rutledge, J., concurring).

exercising article III judicial power over local offenses committed in their respective districts.[15]

It must be remembered that in 1801, there was a distrust of the general federal judicial power. Indeed, this distrust had (a) led to the provision in article III itself that Congress might limit that judicial power almost completely, *National Mutual Insurance Co. of D.C. v. Tidewater Transfer Co., supra* at 634 (Vinson, J., dissenting), and, (b) engendered the notion that judicial power under article III should be expanded only when it could be demonstrated that the particular type of jurisdiction was acutely needed for the purposes of *uniformity* and *national harmony, id.* In sum, we are persuaded that by virtue of the restricted locale of the conduct proscribed by the first District of Columbia Code, the fact that inferior article III courts throughout the several states are incapable of receiving jurisdiction over purely local offenses and the general reluctance in the early days of our nation's history to *expand* the article III judicial power, Congress conveyed the judicial power over District of Columbia felonies to the courts in the District under the *District Clause. See generally National Mutual Insurance Co. of D.C. v. Tidewater Transfer Co., supra; Pang-Tsu Mow v. Republic of China, supra; Keller v. Potomac Electric Power Co.*, 261 U.S. 428 (1923); *Lurk v. United States, supra.*

Even if we were to assume that Congress could have vested *under article III* jurisdiction over what were in 1801 purely local felonies in the courts then existing in the District, the plain language of article III would apparently

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[15] In O'Donoghue v. United States, *supra*, Justice Sutherland justified his conclusion that the local supreme court and circuit court of appeals were article III courts primarily because they exercised parallel jurisdiction with the other inferior *federal* courts in the several states. He stated that the exercise of non-federal or administrative and legislative powers by the local courts by virtue of the District Clause should not deprive those courts of their article III status, 289 U.S. 545. What we infer from the learned Justice's opinion is that the exercise of those powers, which other inferior federal courts cannot exercise (including the power to hear local felonies), must have derived solely from the District Clause. Otherwise, Justice Sutherland surely would have alluded to the jurisdiction over local felonies (which have never been considered as general federal offenses, Gilstrap v. Clemmer, 284 F.2d 304, 308 (4th Cir. 1960) as yet another reason why the local supreme court and circuit court were created by virtue of article III.

not prevent Congress from removing that jurisdiction.[16] We note that the Supreme Court has recognized that "legislative courts," under certain circumstances, are permitted to hear cases involving the same subject matter as those heard by article III courts. *National Mutual Insurance Co. of D.C. v. Tidewater Transfer Co., supra* at 600, 602 and 641 (Vinson, J., dissenting). *See also Burns, Stix Friedman & Co., Inc. v. Commissioner*, 57 T.C. No. 39 (1971). Thus, we see no reason why Congress could not have allowed *both* article III *and* article I courts in the District to hear D.C. felonies, or simply have decided (as it has done in enacting the 1970 Court Reform Act) that the article I court system should be the exclusive judicial forum in the District for such cases.

Concededly, Congress exercises its exclusive legislative power over the District subject *always* to the guaranties of the Bill of Rights[17] and other specific constitutional provisions. However, appellant has not demonstrated that he has any right emanating from article III to be tried for a *local* felony in the District of Columbia before an *article III* judge with lifetime tenure and undiminishable salary because the power of the United States Government to prohibit his conduct and to prosecute him for it *in an appropriate judicial forum* is not based upon the provisions of that article. What Congress has done by enacting the 1970 Court Reform Act is to treat criminal offenders in the District of Columbia as they would be treated in any state (or as they would have been treated if portions of Maryland and Virginia had never been ceded to the United States for the District of Columbia): If the conduct violates a local statute, a local court has jurisdiction to hear and determine their case; if the conduct violates a general federal statute, an article III federal court will have jurisdiction. We find no constitutional error on the part

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[16] *See Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co., supra* at 600, 607 (Rutledge, J., concurring), 627 (Vinson, J., dissenting), 636 (Frankfurter, J., dissenting); *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812); *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799).

[17] Indeed, many of the provisions of the Bill of Rights were applied directly to cases in the District of Columbia long before they were made applicable to the states through the fourteenth amendment, *see, e.g.*, *Nalle v. District of Columbia*, *supra* at 310 n.12.

of Congress in creating the District of Columbia Superior Court and this court to hear and determine "local" crimes.

II.

We turn now the facts of this case. Appellant contends that the trial court should have excluded from evidence the pistol which he was found guilty of possessing because the police seized it from his automobile in violation of his fourth amendment rights.

Officers Busker and Morrissette of the Special Operations Division of the Metropolitan Police Department were in plain clothes and an unmarked police car parked on "T" Street when appellant drove by in the early evening of January 16, 1971. Officer Busker knew from the Virginia license tags on appellant's car that the vehicle had been rented.[10] They decided to run a so-called "spot check" to determine if the appellant had a proper license and rental agreement (the equivalent of proper registration). Appellant had committed no moving traffic violation and his auto had no apparent equipment defect.

The officers followed appellant's car as it made an acute angle left turn from "T" Street onto Florida Avenue and then proceeded northwest on Florida for a few blocks until the officers waved appellant to a stop near the corner of Florida and Vermont Avenues. Appellant alighted immediately and met Officer Busker near the left rear area of his car, while the other officer proceeded to the right front area of the auto. Officer Busker asked for and received from appellant his driver's license. However, when asked for the rental agreement for the vehicle, appellant entered the car and retrieved it from the glove compartment. The agreement by its terms had expired on the previous Tuesday, January 12th. Appellant explained (and his story was later verified by the car rental agency) that he had modified the agreement orally prior to its expiration and that, although the written agreement did not so indicate, he was in fact entitled to drive the car by reason of the oral extension of his rental period.

During this conversation between Officer Busker and

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[10] Officer Busker testified that the numbers on the license tags of rental cars registered in Virginia ran in specified series. This was not contradicted by appellant at trial. (R.14.)

appellant on the left side of the car, Officer Morrissette was glancing at the interior of the vehicle by means of a flashlight." He testified at trial that his presence in that position and his use of the flashlight were standard operating procedure to protect the safety of the other officer who was endangered by the possibility that the driver, retrieving something from his car, might pull out a weapon and assault the officers. (R.59). Officer Morrissette then noticed the trigger mechanism of a pistol protruding out from beneath the armrest on the front of appellant's car. He removed the pistol from appellant's auto and, after learning that it was unregistered, placed appellant under arrest for a violation of D.C. Code 1967, § 22-3204."

The narrow issue posed is whether the officers could properly pull appellant over to the curb and demand his license and registration when (1) they had not seen him violate traffic or vehicular equipment regulations and (2) they had no cause to believe from his actions that he had otherwise engaged or was about to engage in any criminal activity. Appellant argues vigorously that when the officers stopped him by a show of their police authority they had "seized" him within the meaning and protection of the fourth amendment, yet they were not then able, as required by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 21 (1968), "to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."

In reply, the Government contends that there is a right, indeed, a duty mandated by Congress,[3] on the part of a po-

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[1] Appellant's testimony, which was disbelieved at trial, was that Officer Morrissette began an immediate and thorough search of the interior of the car and the trunk as soon as appellant began conversing with Officer Busker. (R. 11-15.)

[2] Appellant alleged at trial that upon finding the weapon in the car after a thorough search of its interior, Officer Morrissette stated, "I told you that a rental car is a good case." (R. 15.) Officer Morrissette denied making such a statement. Under cross-examination, Officer Busker did state that he knew that many rented cars were not returned on time and that he personally knew of a policeman who stopped a rented car and found about $6,000 worth of narcotics in the vehicle. (R.37.)

[3] D.C. Code 1967, § 40-104(a) provides in pertinent part:

It shall be unlawful—

(1) for any person to operate any motor vehicle . . . upon any public highway of the District of Columbia . . . if such motor vehicle . . . is

officer to stop an automobile and require the driver to produce his license and the vehicle's registration without the need of first having reasonable suspicion that the driver lacks these particular documents. We believe that the propositions advanced by the parties are not necessarily irreconcilable within the general framework of the stopping of an automobile by police. We conclude that in this case the trial court's denial of appellant's motion to suppress was correct.

At the outset, we reject the rigid rule which appellant urges us to adopt: That a police officer may stop an automobile for a spot check of the driver's license and the car's registration *only* when he has articulable suspicion, as defined by *Terry*, that either of such documents is invalid. The touchstone of the fourth amendment is reasonableness. It seems to us in this age of the motor car that when the community's interest in limiting use of its highways to licensed drivers in registered autos is balanced against the momentary interruption of the motorist which is necessary to ascertain whether he is complying with these licensing requirements such intrusion is *not* so unreasonable as to be violative of the fourth amendment.[22]

We must keep in mind that if we were to limit the police,

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not registered . . . or . . . if such person does not have in his possession or in the motor vehicle . . . operated the registration certificate. . . .

D.C. Code 1967, § 40-301(c) provides:

Any individual to whom has been issued a permit to operate a motor vehicle shall have such permit in his immediate possession at all times when operating a motor vehicle in the District and shall exhibit such permit to any police officer when demand is made therefor. . . .

See Mincy v. District of Columbia, D.C.App., 218 A.2d 507 (1966).

[22] Mincy v. District of Columbia, *supra* (and the cases cited therein at 218 A.2d at 508 n.3); United States v. Cross, 437 F.2d 385 (5th Cir. 1971); Myricks v. United States, 370 F.2d 901 (5th Cir.), *cert. dismissed*, 386 U.S. 1015 (1967); Lipton v. United States, 348 F.2d 591 (9th Cir. 1965); United States v. Vanguilder, 297 F.Supp. 71 (Md. 1969); United States v. Thomas, 289 F.Supp. 364 (S.D.N.Y. 1968); People v. Andrews, —— Colo. ——, 484 P.2d 1207 (1971); People v. Goldstein, 60 Misc.2d 745, 304 N.Y.S.2d 106 (1969); State v. Valstad, 282 Minn. 201, 165 N.W.2d 19 (1969); People v. Washburn, 265 Cal.App.2d 665, 71 Cal. Rptr. 577 (1968); People v. Nunn, 264 Cal.App.2d 719, 70 Cal. Rptr. 869 (1968); People v. Harr, 93 Ill.2d 146, 235 N.E.2d 1 (1968); State v. Kabayama, 99 N.J.Super. 85, 236 A.2d 164 (1967), aff'd, 52 N.J. 507, 246 A.2d 714 (1968).

Cf. Brinegar v. United States, 338 U.S. 160, 188 (Jackson, J., dissenting), reh. denied, 338 U.S. 839 (1949); Bowling v. United States, 122 U.S.App.D.C. 38, 350 F.2d 1002 (1965).

as appellant urges, to stopping *only* those autos in which the driver might reasonably be suspected to be without a license, for example, because of his youthful appearance, the result would unjustifiably single out and discriminate against certain groups of citizens, *i.e.*, the young. Moreover, such a restrictive ruling by us might render virtually unenforceable the Congressional prohibition against *all* unlicensed drivers and unregistered cars driving on District of Columbia streets.[13] After all, persons who drive in the District without a valid license and registration will not necessarily exhibit conduct or the appearance giving rise to articulable suspicion that they are without proper driving credentials. Thus, they would be immune from the "spot check" to enforce a requirement deemed necessary by Congress for public safety on the District's highways.

We hasten to add that the courts, including ours, have warned law enforcement officers, specifically and emphatically, that a so-called "spot check" is *not* to be "used as a substitute for a search for evidence of some possible crime unrelated to possession of a driver's permit." *Mincy v. District of Columbia*, D.C.App., 218 A.2d 507, 508 (1966), (and the cases cited at 508 n.3). We say again that when the driver has produced his permit and registration and they are in order he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning. *See generally Lowe v. United States*, 407 F.2d 1391, 1395 (9th Cir. 1969); Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161-72 (1966). It is at this precise point that the Supreme Court's explications in *Terry*, with regard to the reasonableness of police conduct in this area of police-citizen contact on the streets, come into play.[14] Once the check for the driver's

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[13] *Mincy v. District of Columbia*, *supra* at 508; *Lipton v. United States*, *supra* at 901; *Myricks v. United States*, *supra* at 904; *People v. Andrews*, *supra*; *People v. Nunn*, *supra*.

[14] Of course, *Terry* does come into play even before the initial stop if there is evidence that the officer's original reason in stopping the vehicle was to investigate some criminal behavior unrelated to the possession of a valid license and valid registration. A significant body of case law has developed the proposition that an officer may detain the driver of a vehicle upon less than probable cause if he has articulable suspicion that the person detained is presently engaged in or about to engage in or has just engaged in criminal activity. *See* United States v. Nicholas, 448 F.2d 622, 626 (8th Cir. 1971);

documents is completed by the officers, they may *not* continue detaining him on the spot unless they *then at that moment* have articulable suspicion that the driver is engaging or has engaged in criminal activity."

We hold in the instant case that the officers had the authority, without observing appellant violate a traffic regulation or otherwise engage in unlawful activity, to stop appellant for the sole purpose of asking him for his driving permit and auto rental agreement. Ordinarily, if he had produced these two documents in proper order the police would have been required to permit him to continue driving on his way without any further questioning. However, since he showed them a rental agreement which had apparently expired, they then had sufficient facts from which they might reasonably infer that he was in unauthorized possession of the car he was driving. Therefore, they were entitled to detain him until the rightful ownership and use of that car could be clarified.

United States v. Madril, 445 F.2d 827, 828 (9th Cir. 1971); United States v. Johnson, 142 U.S.App.D.C. 215, 219-20, 442 F.2d 1239, 1243-44 (1971); United States v. Turner, 442 F.2d 1146, 1148 (8th Cir. 1971); United States v. Harris, 436 F.2d 928, 932 (8th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); Young v. United States, 140 U.S.App.D.C. 333, 336, 435 F.2d 405, 408 (1970); United States v. Leyva-Barragan, 423 F.2d 669, 670 (9th Cir. 1970); Riccardi v. Perini, 417 F.2d 645, 647 (6th Cir. 1969); Bowling v. United States, *supra*; United States v. McIntyre, 304 F.Supp. 1244 (E.D. La. 1969); United States v. Gateway, 297 F.Supp. 67, 69-70 (N.D. Ga. 1969); State v. Dell, 258 La. 914, 249 So.2d 118 (1971); Gustafson v. State, 243 So.2d 615, 619-20 (Fla. Dist. Ct. App. 1971); State v. Smithers, 269 N.E.2d 874, 877-78 (Ind. 1971); State v. Woodford, 26 Ohio Misc. 51, 55-56, 269 N.E.2d 143, 147 (1971); Stone v. People, —— Colo. ——, 485 P.2d 495-98 (1971); State v. Ferguson, 3 Wash.App. 898, 479 P.2d 114 (1971); State v. Goudy, 52 Haw. 497, 479 P.2d 800 (1971); United States v. Frye, D.C.App., 271 A.2d 788, 790 (1970); State v. Hilliard, 81 N.M. 407, 467 P.2d 733 (1970); People v. Nickles, 9 Cal.App.3d 468, 88 Cal. Rptr. 763 (1970); State v. Sedillo, 81 N.M. 47, 462 P.2d 632 (1969); Sarabia v. State, 455 S.W.2d 231, 234 (Tex. Crim. App. 1969) (Onion, J., dissenting); State v. Lewis, 80 N.M. 274, 454 P.2d 360 (1969); People v. Villafuerte, 275 Cal.App.2d 531, 80 Cal. Rptr. 279 (1969); People v. Miesio, 103 Ill.App.2d 398, 243 N.E.2d 795 (1968); People v. Tassone, 41 Ill.2d 7, 241 N.E.2d 419, 421 (1968), *cert. denied*, 394 U.S. 965 (1969); People v. Harr, *supra*.

[*] Quite obviously at this point the "stop" has passed beyond the point of a minor intrusion for a public health and safety purpose (*i.e.*, the license and registration "spot check") and has passed into the realm of an investigation and interrogation focusing on a particular individual whose conduct in a motor vehicle reasonably suggests either a particular license or registration violation or the commission of an unrelated criminal offense.

In sum, the officers upon the instant facts and circumstances were properly positioned alongside the car at the moment one of them saw the pistol in plain view and seized it. Accordingly, there is no violation of the fourth amendment and the trial court correctly admitted the pistol into evidence against appellant at trial. *See Harris v. United States*, 390 U.S. 234, 236 (1968); *Wise v. United States*, D.C.App., 277 A.2d 476 (1971); *United States v. Johnson*, 142 U.S.App.D.C. 215, 442 F.2d 1239 (1971).

III.

Appellant's final contention is that the Government violated his fifth amendment right to equal protection of law by prosecuting him for having the pistol under the "felony-repeater" clause of D.C. Code 1967, § 22-3204 [*] rather than under the "first offender-misdemeanor" clause of D.C. Code 1967, § 22-3203(2).[**] He argues that since these two statutes prescribe different punishments for the identical conduct, to wit, possessing a pistol after having been convicted of a felony, his right to equal protection was denied when one rather than the other was chosen by the Government. *See Berra v. United States*, 351 U.S. 131, 139 (1956)

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[*] D.C. Code 1967, § 22-3204 provides in pertinent part:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215 [fine of not more than $1,000 or imprisonment for not more than one year, or both], unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years. (Emphasis added.)

[**] D.C. Code 1967, § 22-3203 provides in pertinent part:

> No person shall own or keep a pistol, or have a pistol in his possession or under his control, within the District of Columbia, if—
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> . . . .
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> (2) he has been convicted in the District of Columbia or elsewhere of a felony,
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> . . . .
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> Whoever violates this section shall be punished as provided in section 22-3215 [fine of not more than $1,000 or imprisonment for not more than one year, or both], unless the violation occurs after he has been convicted of a violation of this section, in which case he shall be imprisoned for not more than ten years. (Emphasis added.)

(Black, J., dissenting); Olsen v. Delmore, 48 Wash.2d 545, 295 P.2d 324 (1956); *State v. Pirkey*, 203 Ore. 697, 281 P.2d 698 (1955).[*] We disagree.

First, the two statutes in question do *not* proscribe the identical conduct. On the one hand, Section 22-3203(2) makes it a misdemeanor for any *felon* to own or keep a pistol under his control *anywhere* and then goes on to provide a greatly increased penalty if the defendant has previously violated that said section. On the other hand, Section 22-3204 makes it a *misdemeanor* for *anyone* (not simply a felon) to possess on his person, except in his *dwelling house* or on other *land* possessed by him, an *unlicensed* pistol capable of being concealed. A defendant under this statute who has a prior felony conviction may receive up to ten years imprisonment for even a first violation. The prior felony conviction referred to in § 22-3204, unlike the felony provision in § 22-3203(2), is *not* an element of the offense. *Jackson v. United States*, 95 U.S.App.D.C.328, 221 F.2d 883 (1955).

Even if we were to *assume* that both Sections 22-3203(2) and 22-3204 were proscribing certain conduct *by felons*, these two statutes prohibit *differing* kinds of conduct. A felon possessing a pistol in his own home or on other land possessed by him would *not* violate the ban contained in Section 22-3204 against carrying a concealed weapon but would violate only the misdemeanor clause of Section 22-3203(2). In other words, the Government in order to prosecute a felon under the "felony-repeater" clause of Section 22-3204, must not only prove that the defendant was a felon who possessed or controlled a gun (the elements of the § 22-3203(2) misdemeanor), but, in addition, that

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[*] *See also* Dixon v. District of Columbia, 129 U.S.App.D.C. 341, 394 F.2d 966 (1968); Hamilton Nat'l Bank v. District of Columbia, 85 U.S.App.D.C. 109, 176 F.2d 694, *cert. denied*, 338 U.S. 891 (1949); People v. Utica Daws Drug Co., 16 App.Div.2d 12, 225 N.Y.S.2d 128 (1962), where equal protection was violated because irrational distinctions were made by the executive branch of the Government between persons whose conduct was identical within the meaning of the applicable statutes.

From the standpoint of constitutional theory, unequal punishment for the identical conduct may be considered as violative of *due process* (unconstitutional vagueness with regard to the applicable penalty for specified conduct) as well as equal protection (unconstitutional lack of reasonable classification with regard to penalties for offenders guilty of the identical conduct). Since appellant phrases his argument in terms of equal protection, our analysis in the instant case is also in those terms, although our conclusion would be the same if we were to consider his argument upon due process grounds.

the felon had an unlicensed pistol on his person while not in his dwelling or on other land owned by him. *See generally Barrows v. United States*, 380 U.S. 343 (1968); *United States v. Coppola*, 250 F.Supp. 903, 300 F.Supp. 932 (Conn.), *aff'd*, 425 F.2d 660 (2d Cir. 1969).

Equal protection would be denied only if the violation of the misdemeanor clause of § 22-3203(2) invariably constituted a violation of the "felony-repeater" clause of § 22-3204, *see United States v. Coppola*, 425 F.2d at 661 (2d Cir. 1969). Furthermore, we are not dealing with two statutes which are even "functionally equivalent,"[*] because violations of §§ 22-3203(2) and 22-3204 are not susceptible to the identical proof. In sum, the situation presented by the statutes in this case is not at all uncommon.[**] Appellant's status as a felon who possessed an unlicensed pistol while not in his dwelling or on his land constituted an act that violated two different criminal statutes. Simply because the Government could have proven a violation by appellant of both §§ 22-3203(2) and 22-3204 and happened to choose § 22-3204 does not violate appellant's right to equal protection, *Newman v. United States*, 127 U.S.App.D.C. 263, 382 F.2d 479 (1967); *United States v. Coppola*, *supra*.

In addition, the fact that appellant *could* have been charged solely with a "first offender-misdemeanor" violation of § 22-3203(2) does not *entitle him* to be so charged, *Hutcherson v. United States*, 120 U.S.App.D.C. 274, 277, 345 F.2d 964, 967, *cert. denied*, 382 U.S. 894 (1965), since the prosecutor has authority to decide which charge to bring, including a determination on whether to charge appellant under the felony-repeater provisions of these statutes. *Newman v. United States*, *supra*; *Hutcherson v. United States*, *supra*; *Martin v. United States*, D.C.App., 265 A.2d 448 (1971); *United States v. Shaw*, D.C. App., 226 A.2d 906, 908 (1967).

The judgment must be and is

Affirmed.

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[*] In *Hutcherson v. United States*, 120 U.S.App.D.C. 274, 278, 345 F.2d 964, 968, *cert. denied*, 382 U.S. 894 (1965), the concurring opinion written by the now Mr. Chief Justice Burger referred to three different narcotics statutes which were "functionally equivalent" because unexplained possession of the drugs was sufficient to constitute a violation of each statute.

[**] E.g., a defendant may violate a felony statute when he commits armed robbery

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 5831 January Term, 1972

ROOSEVELT F. PALMORE, APPELLANT,

v. 9217-71

UNITED STATES, APPELLEE.

[Filed April 28, 1972]

Appeal from the Superior Court of the District of Columbia, CRIMINAL DIVISION.

BEFORE: Kelly, Kern and Nebeker, Associate Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the Superior Court of the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Superior Court of the District of Columbia, in this cause, be and the same is hereby, affirmed.

Per Curiam.
For the Court:

/s/ Alexander L. Stevas
ALEXANDER L. STEVAS,
Clerk.

Dated: April 28, 1972.
Opinion per Associate Judge John W. Kern, III.

DISTRICT OF COLUMBIA COURT OF APPEALS

ROOSEVELT F. PALMORE,
APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

No. 5831

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[Filed May 9, 1972]

Notice is hereby given that Roosevelt F. Palmore, the appellant herein, hereby appeals to the Supreme Court of the United States from the final judgment of the District of Columbia Court of Appeals, affirming the judgment of conviction, entered herein on April 28, 1972.

This appeal is taken pursuant to 28 U.S.C. § 1257(2) and 11 D.C. Code § 102 (Supp. IV, 1971).

[Signature omitted]

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 5831 January Term, 1972

ROOSEVELT F. PALMORE, APPELLANT,

v. No. 9217-71

UNITED STATES, APPELLEE.

BEFORE: Kelly, Kern and Nebeker, Associate Judges.

ORDER

[Filed May 11, 1972]

On consideration of appellant's motion to stay the transmittal of this Court's mandate to June 30, 1972, it is

ORDERED that appellant's aforesaid motion be granted and this Court shall stay transmittal of the mandate to and including June 30, 1972.

In the event appellant files an appeal in the Supreme Court of the United States on or before June 30, 1972, this Court shall further stay the transmittal of the mandate pending final disposition by the Supreme Court of the United States.

BY THE COURT:

/s/ Catherine B. Kelly
CATHERINE B. KELLY,
Associate Judge.

SUPREME COURT OF THE UNITED STATES

No. 72-11

ROOSEVELT F. PALMORE, APPELLANT,

v.

UNITED STATES

APPEAL from the District of Columbia Court of Appeals.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is postponed to the hearing of the case on the merits.

OCTOBER 10, 1972

☆ U.S. Government Printing Office: 1972—482-539/311